REPORTS OF CASES

DECIDED IN THE

SUPREME COURT

OF THE

STATE OF NORTH DAKOTA,

JUNE, 1898 TO NOVEMBER, 1899.

JOHN M. COCHRANE,
REPORTER.

VOLUME 8

GRAND FORKS, N. D.
HERALD, STATE PRINTERS AND BINDERS.

Entered according to Act of Congress in the year A. D. nineteen hundred,
By JOHN M. COCHRANE,
In the office of the Librarian of Congress at Washington, D. C.

Rec. Jan. 21, 1901.

OFFICERS OF THE COURT DURING THE PERIOD OF THESE REPORTS.

HON. GUY C. H. CORLISS, Chief Justice.*
HON. J. M. BARTHOLOMEW,*
HON. ALFRED WALLIN, and
HON. N. C. YOUNG,* Judges.

R. D. HOSKINS, Clerk.
JOHN M. COCHRANE, Reporter.

*Chief Justice Corliss resigned his position as a member of the court Aug. 15, 1898 and Judge Young was appointed to fill the vacancy. Judge Bartholomew became Chief Justice on Aug. 15, 1898

Section 101. When a judgment or decree is reversed or confirmed by the Supreme Court, every point fairly arising upon the record of the case shall be considered and decided, and the reasons therefor shall be concisely stated in writing, signed by the judges concurring, filed in the office of the clerk of the Supreme Court and preserved with a record of the case. Any judge dissenting therefrom, may give the reasons of his dissent in writing over his signature.

Section 102. It shall be the duty of the court to prepare a syllabus of the points adjudicated in each case, which shall be concurred in by a majority of the judges thereof, and it shall be prefixed to the published reports of the case.

CASES REPORTED IN THIS VOLUME.

A

	PAGE
Aasen, Twp. of Noble v.	77
Anderson v. Todd	158
Andrews & Gage, Marshall v.	364
Angel, Kuhnert v.	198
Anheier v. Signor	499

B

Barker, Crandell v.	263
Barker, Knox v.	272
Barnes, Red River Valley Bank v.	432
Barrett, Best v.	49
Baumer v. French	319
Becker v. Cain	615
Becker v. Duncan	600
Benoit v. Revoir	226
Bergsvendsen, Ricks v.	578
Best v. Barrett	49
Best v. Muir	44
Black v. Elevator Co.	96
Booker, Bray v.	347
Borsheim, Plummer v.	565
Boucher, State v.	277
Boyum v. Johnson	306
Bray v. Booker	347
Brummond v. Krause	573
Brynjolfson v. Thingvalla	106
Burke, Dickinson v.	118

C

Cain, Becker v.	615
Cairns, Hale v.	145
Cameron v. G. N. Ry. Co.	124
Cameron v. G. N. Ry. Co.	618
Canfield v. Robertson	603
Carruth v. Taylor	166
Cass County, Chicago, M. & St. P. Ry. Co. v.	18
Cass County, Wilson v.	456
Chicago, M. & St. P. Ry. Co. v. Cass County	18
City of Casselton, Trost v.	534
Clendening v. Hawk	419
Coleman v. Fargo	69
Commercial Nat'l Bk. v. Red River Nat'l Bk	382
Crandell v Barker	263
Crawford, State v.	539
Currie, State v.	545

D

Davis, Farmers & M. Nat'l Bank v.	83
Dickey County, Paine v.	581
Dickinson v. Burke	118
Dinnie, Engstad v.	1
Dinnie v. Johnson	153
Divet v. Richland County	65
Dobbin, Meldahl v.	115
Donovan v. Elevator Company	585
Duncan, Becker v.	600

E

Eddie v. Eddie	376
Edmonson v. White	72
Ekanger, State v.	559
Emery, Lay v.	515
Engstad v. Dinnie	1
Evens, People v.	121
Ewing, Morris v.	99

F

Fadden, First M. E. Church v.	162
Falley, State v.	90
Fargo, Colemen v.	69
Farmers & M. Nat'l Bank v. Davis	83
Farmers State Bank, Omlie v.	570
First M. E. Church v. Fadden	162
First Nat'l Bk. Corunna v. Michigan City Bk.	608
First Nat'l Bk. Fargo v. M. & N. Elevator Co.	430
First Nat'l Bk. Fargo, Roberts v.	474
First Nat'l Bk. Fargo, Roberts v.	504
First Nat'l Bk. Grand Forks, Second Nat'l Bk. v.	50
First State Bank, Krump v.	75
Foster v. Furlong	282
Francis, Peoples State Bank v.	369
French, Baumer v.	319
Furlong, Foster v.	282

G

Garbutt, Prondzinski v.	191
Gilman v. Township Gilby	627
Gjerstadengen v. Hartzell	424
Glynn v. Glynn	233
Grand Forks County, St. Luke's Hospital Assn. v.	241
Great Northern Ry. Co., Cameron v.	124
Great Northern Ry. Co., Cameron v.	618
Great Northern Ry. Co., Haug v.	23
Great Northern Ry. Co., McTavish v.	94
Great Northern Ry. Co., McTavish v.	333
Great Northern Ry. Co., Young v.	345

H

	PAGE
Hale v. Cairns	145
Hanberg v. Nat'l Bank of Wahpeton	328
Hartzell, Gjerstadengen v.	424
Haug v. Great Northern Ry. Co.	23
Hawk, Clendening v.	419
Hayes, Rosenbaum v.	461
Heyrock v. McKenzie	601
Hill v. Wilson	309
Hogan, State v.	301
Hollinshead v. Stuart	35
Howland v. Ink	63
Howser v. Pepper	484

I

Ingwaldson v. Skrivseth	544
Ink, Howland v.	63

J

James v. Wilson	186
Johnson, Boyum v.	306
Johnson, Dinnie v.	153
Johnson, Radford v.	182
Jones, Plano Mfg. Co. v.	315

K

Kaeppler v. Pollock	59
Kaeppler v. Red River Valley Nat'l Bank	406
Kellar, State v.	563
Kidder County, McHenry v.	413
Kinneberg v. Kinneberg	311
Klectzen, State v.	286
Knox v. Barker	272
Koerner, State v.	292
Krause, Brummond v.	573
Krump v. First State Bank	75
Kuhnert v. Angel	198

L

Lane v. O'Toole	210
Langdon Mercantile Co., Warnken v.	243
Lay v. Emery	515
Lorin v. Seitz	404
Luger, Martin v.	220

M

Mares v. Wormington	329
Marshall v. Andrews & Gage	364
Martin v. Luger	220
McGauvran, Webster v.	274
McHenry v. Kidder County	413
McKenzie, Heyrock v.	601
McTavish v. G. N. Ry. Co.	94
McTavish v. G. N. Ry. Co.	333
Meldahl v. Dobbin	115
Michigan City Bank, First Nat'l Bank Corunna v.	608
Miller v. Schallern	395
Minneapolis & Northern El. Co., Black v.	96
Minneapolis & Northern El. Co., First Nat'l Bank v.	430
Moran, Oswald & Co. v.	111
Morris v. Ewing	99
Muir, Best v.	44
Muri v. White	58

N

Nat'l Bank of Wahpeton, Hanberg v.	328
Nichols & Shepherd Co., Paulson v.	606

O

O'Connor, Tetrault v.	15
Oliver v. Wilson	590
Omlie v. Farmers State Bank	570
Omlie, O'Toole v.	444
Oswald v. Moran	111
O'Toole, Lane v.	210
O'Toole v. Omlie	444

P

Paine v. Dickey County	581
Patterson v. Ward	87
Paulson v. Nichols & Shepherd Co.	606
Paulson Merc. Co. v. Seaver	215
Peckham v. Van Bergen	595
Peoples v. Evens	121
People's State Bank v. Francis	369
Pepper, Howser v.	484
Pierce County, Rolette County v.	613
Plano Mfg. Co. v. Jones	315
Pollock, Kaeppler v.	59
Prondzinski v. Garbutt	191

R

Radford v. Johnson	182
Red River Valley Nat'l Bank v. Barnes	432
Red River Valley Nat'l Bank, Commercial Nat'l Bank v.	382
Red River Valley Nat'l Bank, Kaeppler v.	406
Renoir, Benoit v.	226
Richard v. Stark County	392
Richland County, Divet v.	65
Ricks v. Bergsvendsen	578
Roberts v. First Nat'l Bank Fargo	474
Roberts v. First Nat'l Bank Fargo	504
Robertson, Canfield v.	603
Rolette County v. Pierce County	613

	PAGE
Rosenbaum v. Hayes	461
Rosum, State v.	548

S

Schallern, Miller v.	395
Seaver, Paulson Merc. Company v.	215
Second Nat'l Bank v. First Nat'l Bank	50
Security Loan & Trust Co., Smith v.	451
Seitz, Lorin v.	404
Shain, U. S. Saving & Loan Co. v.	136
Signor, Anhier v.	499
Skrivseth, Ingwaldson v.	544
Smith v. Security L. & T. Co.	451
St. Anthony & D. Elev. Co., Donovan v.	585
St. John, Turner v.	245
St. Luke's Hospital Ass. v. County	241
State v. Boucher	277
State v. Crawford	539
State v. Currie	545
State v. Ekanger	559
State v. Falley	90
State v. Hogan	301
State v. Kellar	563
State v. Koerner	292
State v. Klectzen	286
State v. Rosum	548
Stierlen v. Stierlen	297
Stolzman v. Wyman	108
Stuart, Hollinshead v.	35

T

Taylor, Carruth v.	166
Tetrault v. O'Connor	15
Thingvalla, Brynjolfsen v.	106
Todd, Anderson v.	158
Township Gilby, Gilman v.	627
Trost v. City of Casselton	534
Turner v. St. John	245

U

U. S. Savings & Loan Co. v. Shain	136

V

Van Bergen, Peckham v.	595

W

Ward, Patterson v.	87
Warnken v. Langdon Merc. Co.	243
Webster v. McGauvran	274
White, Edmondson v.	72
White, Muri v.	58
Wilson v. Cass County	456
Wilson, Hill v.	309
Wilson, James v.	186
Wilson, Oliver v.	590
Wormington, Mares v.	329
Wyman, Stolzman v.	108

Y

Young v. Great Northern Ry. Co.	345

TABLE OF DAKOTA CASES CITED IN OPINIONS.

Aldrich v. Wilmarth	3 S. D. 523	160
Anderson v. Bank	5 N. D. 80	223
Arneson v. Spawn	2 S. D. 269	185
Bailey v. Scott	1 S. D. 337	594
Bedow v. Tonkin	5 S. D. 432	602
Best v. Muir	8 N. D. 44	49-317
Betts v. Signor	7 N. D. 399	105
Black v. M. & N. Elev. Co.	7 N. D. 129	96
Black v. M. & N. Elev. Co.	8 N. D. 96	545
Black v. Walker	7 N. D. 414	602
Bowman v. Eppinger	1 N. D. 21	16
Braithwaite v. Akin	2 N. D. 57	602
Bray v. Booker	6 N. D. 526	357
Buxton v. Sargent	7 N. D. 503	416
Cameron v. G. N. Ry. Co	8 N. D. 124	329-338-620
Cass County v. Certain Lands	7 N. D. 528	114
Christianson v. Farmers' W. H. Ass'n	5 N. D. 438	73
Church v. Walker	10 S. D. 90	498-496
Colby v. McDermont	6 N. D. 495	16
Conrad v. Smith	6 N. D. 337	164
Coulter v. G. N. Ry. Co.	5 N. D. 568	325
Crandell v. Barker	8 N. D. 272	273
Divett v. Richland County	8 N. D. 65	583
Doty v. Bank	3 N. D. 9	51
Edmunds v. Herbrandson	2 N. D. 270	568
Elton v. O'Connor	6 N. D. 19	95
Enderlin Bank v. Jennings	4 N. D. 228	426
Farguson v. Talcott	7 N. D. 183	309
Farmers' & Merchants' Nat. Bk. v. Davis.	8 N. D. 83	204-580-597
Field v. Elevator Co.	5 N. D. 400	135-329-338-593-614
First National Bank v. Laughlin	4 N. D. 391	115-80
First National Bank v. Lamont	5 N. D. 393	438
First Nat. Bank v. Merchants' Nat. Bank.	5 N. D. 161	598
Fisher v. Porter	77 N. W. Rep. 112	586
Fletcher v. Nelson	6 N. D. 94	318
Fuller v. Elevator Company	2 N. D. 220	469
Gaar Scott & Co. v. Spaulding	2 N. D. 414	545
Gjerstadengen v. Van Dusen	7 N. D. 612	426
Goose River Bank v. Gilmore	3 N. D. 188	594
Goose River Bank v. School Township	1 N. D. 26	630-12
Gram v. Ry. Co.	1 N. D. 259	343
Granger v. Roll	6 S. D. 611	79
Gull River Lumber Co. v. Osborne	6 N. D. 276	158-322
Hamlin County v. Clark County	1 S. D. 131	241
Harris v. Watkins	5 Dak. 374	556
Haxton Steam Heater Co. v. Gordon	2 N. D. 246	262
Hegar v. De Groat	3 N. D. 354	512
Hill v. Alliance Bldg. Co.	6 S. D. 421	261
Hollinshead v. Stuart & Co.	8 N. D. 35	110
Howard v. Huron	5 S. D. 539	426
Ingwaldson v. Skrivseth	7 N. D. 388	544
In re Eaton	7 N. D. 269	170-179-593
In re Hammill	9 S. D. 390	173-169

In re Weber	4 N. D. 119	337-593-614
In re Weber	4 N. D. 119	135-329
Jasper v. Hazen	1 N. D. 75	195
Johnson v. Day	2 N. D. 295	165
Lane v. O'Toole	8 N. D. 210	572
Lane v. Starr	1 S. D. 215	440
Locke v. Hubbard	9 S. D. 364	135-329
Lovejoy v. Bank	5 N. D. 623	423
Lyons v. Miller	2 N. D. 1	228-230
Martin v. Luger Furniture Co.	6 N. D. 351	221
McKittrick v. Pardee	8 S. D. 39	496
McRea v. Hillsboro Nat. Bank	6 N. D. 353	130-245
McTavish v. G. N. Ry. Co.	8 N. D. 94	336
McTavish v. G. N. Ry. Co.	8 N. D. 333	345
Meldahl v. Dobbin	8 N. D. 115	512
Merrill v. Hurley	6 S. D. 592	39
Miller v. Scallern	8 N. D. 395	495-404
Miner v. Francis	3 N. D. 549	228-230
Moore v. Booker	4 N. D. 543	356
Morrison v. Oium	3 N. D. 76	473
Myrick v. McCabe	5 N. D. 422	179-170
Newell v. Wagness	1 N. D. 62	443
New England Mtg. Sec'ty Co. v. Elev. Co.	6 N. D. 407	166
Nichols & Shepard Co. v. Stangler	7 N. D. 102	79
Noble v. Aasen	8 N. D. 77	115
Northern Pac. Ry. Co. v. Traill Co.	115 U. S. 600	117
Northrup v. Cross	2 N. D. 433	275
O'Toole v. Omlie	8 N. D. 444	214
O'Neil v. Tyler	3 N. D. 47	513-510
Parker v. Bank	3 N. D. 87	423
Parrott v. Hot Springs	9 S. D. 202	317
Patch v. Northern Pac. Ry. Co.	5 N. D. 55	157
Patterson v. Ward	6 N. D. 359	88
Paulson v. Nichols & Shepard Co.	6 N. D. 400	607
Penfield v. Tower	1 N. D. 216	264
Pickett v. Rugg	1 N. D. 230	431
Pirie v. Gillitt	2 N. D. 255	245
Pollock v. Pollock	9 S. D. 48	234
Power v. Bowdle	3 N. D. 107	416
Power v. Larabee	2 N. D. 141	513
Red River Lumber Co. v. Friel	7 N. D. 46	259
Roberts v. Bank	8 N. D. 504	585
Roehr v. Great Northern Ry. Co.	7 N. D. 95	346
Rolph v. City of Fargo	7 N. D. 640	512
Rosenbaum v. Hayes	5 N. D. 479	465
Sanforth v. Elevator Co.	2 N. D. 6	208
Second National Bank v. Bank	8 N. D. 50	262
Shattuck v. Smith	6 N. D. 56	8
Smith v. Ry. Co.	3 N. D. 17	341
Stanford v. McGill	6 N. D. 536	166
State v. Barnes	3 N. D. 135	552
State v. Davis	2 N. D. 461	179-170
State v. Denoyer	6 N. D. 586	400
State v. Haas	2 N. D. 202	393
State v. Haynes	7 N. D. 352	564
State v. Haynes	7 N. D. 70	617
State v. Hazeldahl	2 N. D. 521	55
State v. Kent	5 N. D. 516	562-557
State v. McKnight	7 N. D. 444	593
State v. Nomland	3 N. D. 427	393-68

State v. Rozum	8 N. D. 548	562
Taylor v. Jones	3 N. D. 235	602
Taylor v. Rice	1 N. D. 72	16
Territory v. O'Hare	1 N. D. 30	557
Thuet v. Strong	7 N. D. 565	84
Tierney v. Insurance Co	4 N. D. 565	584
Turner v. St. John	8 N. D. 245	327
Tyler v. Cass County	1 N. D. 369	583
United States Sav. & L. Co. v. Shain	8 N. D. 136	149
Vail v. Town of Amenia	4 N. D. 239	80
Vallier v. Brokke	7 S. D. 343	495
Van Dyke v. Doherty	6 N. D. 263	427
Vermont L. & T. Co. v. Whithed	2 N. D. 82	568
Vickery v. Burton	6 N. D. 253	245-130
Washburn Mill Co. v. Bartlett	3 N. D. 138	141
Winton v. Knott	7 S. D. 179	169
Wood v. Nissen	2 N. D. 26	107
Woodenware Co. v. Jaensen	4 Dak. 149	428

CASES

ARGUED AND DETERMINED

IN THE

SUPREME COURT OF NORTH DAKOTA

J. E. ENGSTAD, *et al. vs.* JOHN DINNIE, *et al.*

Opinion filed June 4th, 1898.

Municipal Corporations—Tax Levy—Appropriations.

Held, construing sections 2190, 2262, Rev. Codes, that a valid tax levy cannot be accomplished by a mere resolution adopted by a city council, which purports to levy certain amounts for the general fund, interest fund, and sinking fund for the fiscal year. It is essential to the validity of a tax levy under section 2190 that the council should adopt, either prior to or at the time of the levy, an ordinance embracing the annual appropriation bill for the current year, specifying the several purposes for which the appropriations are made, and the amount appropriated for each. The levy must be "based upon the annual appropriation bill for the year."

Annual Appropriation Bill—Validity.

The city council of the City of Grand Forks, at its regular meeting held on September 9, 1897, passed a certain resolution whereby certain sums as taxes were attempted to be levied for the general fund, the interest fund, and the sinking fund for the current fiscal year. No annual appropriation bill for that year had been enacted at that time. Subsequently, and on December 18th of the same year, said city council adopted an ordinance entitled "Annual Appropriation Bill," and whereby various sums were attempted to be appropriated out of the general fund for that year. *Held*, under section 2262, that said purported appropriation bill was null and void. Said bill was not sanctioned by a majority of the voters, nor by a two-thirds vote of the council, and the same was in no wise connected with the attempted tax levy for the fiscal year. Under the charter, the enactment was too late.

Extraordinary Expenditures Enjoined.

Held, under said sections of the Rev. Codes, that a costly improvement, including a brick building and the necessary machinery for an electric light plant, to be owned and operated by the city corporation, cannot be paid for out of the general fund of the city, in the absence of any annual appropriation bill authorizing an expenditure for such purpose, and specifying the amount to be expended therefor. Where

there has been no appropriation and no tax levy for any such purpose, the city council cannot lawfully divert the general fund of the city in the treasury to defray the expense of building and equipping such a plant, and under such conditions all contracts to build and equip such an improvement which are attempted to be made by the city council are ultra vires and void, and the completion of such contracts may be enjoined by a court of equity in an action in behalf of the public, brought by a taxpayer for that purpose.

Laches—Estoppel.

Held, under the facts of this case, that the public represented by taxpayers was not estopped by its laches from bringing this action.

Appeal from District Court, Grand Forks County; *Fisk,* J.

Action by J. E. Engstad, Burke Corbet, J. H. Bosard, M. Reilly, James Lankin and O. E. Nash, residents and taxpayers of the City of Grand Forks, North Dakota, against John Dinnie, mayor; Frank A. Brown, auditor, and M. L. Gorden, treasurer of the City of Grand Forks, to enjoin the carrying out of a contract for the construction and equipment of an electric light plant, and to enjoin the issuance and payment of the warrants of said city to the contractors for said improvement. From a judgment dismissing the action, plaintiffs appeal.

Reversed.

Cochrane & Feetham, for appellants.

It is averred in the complaint and admitted by the answer that the city was indebted beyond the statutory limit when this contract was made, and the contractors were bound to know this fact. *City* v. *Gamewell,* 45 N. E. Rep. 591; *Treadway* v. *Schnauber,* 1 Dak. 227; *Farmers' etc. Bank* v. *School District,* 6 Dak. 255; *State* v. *Getchell,* 3 N. D. 243; *McCoy* v. *Brant,* 53 Cal. 247; *Doon Township* v. *Cummins,* 12 Sup. Ct. Rep. 223; *County* v. *Dickson,* 6 Sup. Ct. Rep. 901. The allegation of defendants that the contract was partially performed was impertinent. Part performance can not be urged in defense to an ultra vires contract either by way of ratification or estoppel. *Norton* v. *County,* 6 Sup. Ct. Rep. 1131; *Marsh* v. *Fulton County,* 10 Wall. 676; *County* v. *Dickinson,* 6 Sup. Ct. Rep. 897; *Kelly* v. *Town,* 8 Sup. Ct. Rep. 1101; *State* v. *Getchell,* 3 N. D. 243; *Capital Bank* v. *School District,* 1 N. D. 479. The effect of the constitutional inhibition (Sec. 183 Const., § 2148 Rev. Codes) is to require the city to carry on its operations while so indebted upon a cash system, that is payment must be provided for by levy made as distinguished from levy to be laid. *Spilman* v. *City,* 14 S. E. Rep. 283, 2 Beach Pub. Corp. § 622 n. The making of the contracts created a liability within the meaning of the inhibition. *Sackett* v. *City,* 88 Ind. 476; *City* v. *Edwards,* 84 Ill. 626; *Tennant* v. *Crocker,* 48 N. W. Rep. 579; *Spilman* v. *City,* 14 S. E. Rep. 279; *City* v. *Gamewell,* 45 N. E. Rep. 590. The debt limit having been reached the city could contract no liability not provided for in the annual tax levy without a vote. §§ 2492,

2262 Rev. Codes; 2 Beach Pub. Corp. 810; *French* v. *City*, 42 Ia. 617; *Hebard* v. *Ashland*, 12 N. W. Rep. 437; *Book* v. *Earl*, 87 Mo. 246, 254; *Francis* v. *Howard Co.*, 50 Fed. Rep. 44; *Prince* v. *City*, 21 N. E. Rep. 768; *Gould* v. *City*, 4 S. W. Rep. 650; *German Am. Sav. Bank* v. *City*, 49 Pac. Rep. 542; *Shannon* v. *City*, 69 N. W. Rep. 598; *City* v. *Gamewell*, 45 N. E. Rep. 590. No provision for this expenditure was made in the annual appropriation bill, and no tax levy made as required by statute. §§ 2263, 2262, 2190, 2264, Rev. Codes; *Shattuck* v. *Smith*, 6 N. D. 56; *Donovan* v. *City*, 33 N. Y. 290; *Tennant* v. *Crocker*, 48 N. W. Rep. 577; *Bladen* v. *Philadelphia*, 60 Pa. St. 464. Defendants as officers of the city cannot urge an estoppel against their own violation of duty and express law. *Bank* v. *School Twp.*, 1 N. D. 96; 2 Pom. Eq. § 813; *Tube Works* v. *City*, 5 Dak. 54.

Bangs & Guthrie, for respondents.

The complainants have by their delay suffered other parties to incur expense and to enter into contracts and engagements of a burdensome character, this laches will preclude them in obtaining equitable relief. 2 Story Eq. § 959; Herman on Estoppel § 1221; *Tash* v. *Adams*, 10 Cush. 252. Laches is a bar to relief in equity. *Smith* v. *Thompson*, 54 Am. Dec. 126; *Bausman* v. *Kelley*, 38 Minn. 197; *Kellogg* v. *Ely*, 15 Ohio St. 64; *Wiggin* v. *Mayor*, 9 Paige 24. The Court will refuse an injunction, because of the unnecessary delay of the parties seeking it, if the expense of constructing the work complained of has been incurred. *Hartness* v. *Mad River*, 6 Ohio St. 137; *Collins* v. *City*, 12 Green (N. J.) 293; *Chamberlain* v. *Town*, 14 At. Rep. 865; *City* v. *Alexandria*, 12 Pet 93; *Attorney General* v. *Ry. Co.*, 9 Green 49; *Ellis* v. *Karl*, 7 Neb. 381; *Royal Bank* v. *Ry. Co.*, 150 Mass. 490; *Bigelow* v. *Los Angeles*, 85 Cal. 614; *Osborn* v. *Ry. Co.*, 37 Fed Rep. 830; *East St. Louis* v. *Ry. Co.*, 98 Ill. 415. The making of the contracts for construction of power house did not create an indebtedness against the city. A debt is a specified sum of money which is due from one person to another and denotes not only an obligation of a debtor to pay, but also the right of the creditor to receive and enforce the payment. *City* v. *Hames*, 112 Ind. 323; *French* v. *Burlington*, 42 Ia. 514; *Grant* v. *Davenport*, 36 Ia. 396; *Quill* v. *Indianapolis*, 124 Ind. 292; *Spillman* v. *Parkersburg*, 35 W. Va. 613; *Burlington* v. *Woodard*, 49 Ia. 58; *Crowder* v. *Town*, 128 Ind. 496; *Wood* v. *Partridge*, 11 Mass. 487; *Dively* v. *City*, 27 Ia. 227; *Valpariso* v. *Gardner*, 97 Ind. 1; *State* v. *McCauley*, 15 Cal. 430; *Smith* v. *Dedham*, 144 Mass. 177; *Ithica Water Wks. Co.* v. *Ithica*, 31 Hun. 426; 38 Am. Rep. 97.

WALLIN, J. This action was brought by resident taxpayers of the City of Grand Forks to enjoin said city, and its officers, who are made defendants, from completing the erection of a certain brick building, and placing therein certain machinery, and paying

for the same out of the city treasury, which building and machinery are intended to be used, when completed and furnished, as an electric light plant to be owned and operated by said city. The action was tried without a jury, and resulted in the entry of a judgment in the District Court dismissing the action, with costs against the plaintiffs. The abstract of the record filed in this Court is voluminous, and the plaintiffs' attorneys have assigned a formidable array of errors in their brief, but for the purpose of disposing of the case we have not found it necessary to pass upon any question which is not directly related to the power of the city council to contract for the electric light plant, and pay for the same out of the general fund of the city. No claim is made that the fund to pay for the plant is to be derived from any special fund arising upon the sale of bonds; on the contrary, the contention of counsel for the respondents is that the building and machinery can and will be paid for out of the general fund of the city.

To develop the pivotal question in the case it will be necessary to mention only certain facts disclosed by the record, and with respect to which there is no controversy between counsel. It is conceded that the City of Grand Forks, through its officers, and pursuant to certain bids which had been previously made in response to proposals for bids made in behalf of the city, did, on the 26th day of January, 1898, enter into certain contracts in writing as follows: One of said contracts was made by and between the City of Grand Forks and James Dinnie, whereby it was agreed that said Dinnie, for a consideration of $2,665, to be paid by the city, should erect and build a brick building for the city in accordance with plans as stated in said contract, the said building to be used as a part of an electric light plant to be owned and operated by said city. The other of said written contracts was made and entered into between the City of Grand Forks and the firm of W. F. Grey & Co., and whereby said firm, in consideration of the sum of $12,703, agreed to be paid by the city, undertook to furnish and place in said brick building a dynamo and certain machinery and appliances, as stipulated by the contract, the same to constitute a part of said electric light plant. It is conceded that prior to the commencement of this action said contracting parties, viz. James Dinnie and said firm of W. F. Grey & Co., had respectively entered upon the performance of their contracts, and had performed a part thereof, and the city had allowed a claim or bill presented on account of said contract with Dinnie, and issued and delivered to said Dinnie a city warrant therefor for the sum of $1,168.16; and the city had also issued and delivered to said firm of Grey & Co., on account of material furnished under said contract, a city warrant for $130. The right of the City of Grand Forks, which is organized under Chapter 28 of the Political Code, to enter into the contracts we have mentioned, is broadly challenged by the plaintiffs' counsel. It

is conceded that among the powers expressly conferred upon the city is that of providing for the lighting of the city. Rev. Codes, § 2148. The contention is that the city in attempting to exercise this power has wholly failed to conform to plain charter requirements, which are made prerequisites to its exercise, and without which the said contracts could not lawfully be entered into, or the plant be lawfully paid for out of the general fund of the city, or at all. In a nutshell, the claim is made in behalf of the plaintiffs that no sum or amount whatever was ever lawfully levied or lawfully appropriated by the city council to meet and defray, out of the general fund, the large expense necessarily included in the erection and furnishing of an improvement within the city such as that contemplated by the contracts we have mentioned; and consequently that the city has prematurely and without authority of law entered upon the enterprise of providing light for the city by the erection of the building and equipping the same as stated in said contracts.

We remark first, although the point was not made by counsel, that we question whether, under said charter, it would be lawful either for the city to levy or appropriate funds to build and equip an electric light plant to be owned and operated by the city, until such plant had been authorized by some ordinance passed and adopted for that purpose, and which should make provision for maintaining and operating the plant after its construction and equipment. No such ordinance was ever passed by the city council. As has been seen, the charter clothes the city council with the general power to provide for lighting the city; but the charter nowhere provides the mode or points out the manner of making such provision. In such cases the charter expressly provides as follows: "When, by this chapter the power is conferred upon the city council to do and perform any act or thing, and the manner of exercising the same is not specifically pointed out, the city council may provide by ordinance the details necessary for the full exercise of such power." Rev. Codes, § 2333; Id., § 2148, subd. 77. The manifest object of this statutory provision is to prevent, and not permit, the council to actually exercise large grants of authority without specific regulations of the same first having been made by some enactment which has the force of law. Hence the requirement that either the charter or some ordinance shall point out the manner of exercising power specifically granted in the charter. A mere resolution of the council does not suffice to meet this requirement. We mention this matter here, not as the crucial point in this case, but to call attention to the fact that when the action hereafter mentioned was taken by the city council, which bears upon the electric light plant in question, no ordinance had ever been adopted by the city council declaring that the city should build, own, or equip an electric light plant, or providing for the maintenance or control of any such plant. As has been seen, it is not pretended in behalf of the city that the funds necessary to build and equip the plant were raised or

expected to be raised by the sale of bonds, or from any fund other that the general fund of the city; and much evidence was offered at the trial in behalf of the city for the purpose of showing that the tax levy of September, 1897, for the general fund, when reinforced by certain back taxes, collected and uncollected, would furnish sufficient funds to defray the ordinary expenses of the city, and also to leave an unexpended balance sufficient to build and equip the plant in question. But, in the view we are compelled to take of the facts and issues embraced in this record, it is not, in our opinion, important to inquire whether or not the general fund was replete, or whether there was or was not on hand and available to build and equip the plant an amount of revenue, either levied or collected, belonging to the general fund of the city. We are far from being convinced by the evidence in the record that the condition of the city treasury was such that at the time said contracts were entered into the city had funds on hand belonging to the general fund sufficient in amount to meet the current expenses of the city, and build and equip an electric light plant such as was contracted for by the city. But, if such funds were available, we should still hold that the contracts in question were ultra vires. In our opinion, the objections to these contracts as binding obligations are radical and insurmountable. They were entered into at a time and under circumstances which are fatal to their validity. The contracts were without authority of law for the reason that no such improvement as that comprehended in the erection of a brick building and its equipment, with the machinery mentioned, was ever authorized or provided for either by an annual appropriation bill for said city for 1897, or by the tax levy of 1897 for the then current fiscal year. The city council of Grand Forks, at its regular meeting in September, 1897, adopted a certain levying resolution, which is the only attempt to levy a tax which was made by the council in said year. No mention was made in said resolution of any improvement of the character of that contracted for later by said written contracts, nor was the matter of an electric light plant referred to in the resolution. The wording of the said resolution is as follows: "Be it resolved by the city council of the City of Grand Forks, North Dakota, that there be, and is hereby, levied on the property subject to taxation in the City of Grand Forks, North Dakota, as taxes for the fiscal year commencing September 1st, 1897, and ending August 31st, 1898, the sum of fifty-two thousand dollars; said amount to be divided as follows: For general fund purposes, the sum of $35,000; for interest fund purposes, $15,500; for sinking fund purposes, $1,500." It further appears that said amounts were extended upon the tax books of the county by the county auditor. No annual appropriation bill was passed or adopted in said year, either prior to or concurrently with said levying resolution of September 9, 1897. Nor was there an attempt to pass any ordinance embracing an annual appropriation bill by said city council in said year other

than a certain alleged enactment which was adopted by the council on the 18th day of December, 1897, and which reads as follows:

"An ordinance making the annual appropriation for the fiscal years 1897 and 1898, entitled "The Annual Appropriation Bill."

"Be it ordained by the city council of the City of Grand Forks, North Dakota:

Section 1. Salaries and Expenses. There is hereby appropriated from the general fund of said city the sum of fifty thousand dollars ($50,000.00), or so much thereof as may be necessary, for the purpose of paying salaries of city officers, defraying the expense of erecting, completing and installing an electric light plant for said city, and the operation expense of the same during said fiscal year, and the general and incidental expenses of the city government, including the payment of city orders out of the general fund.

"Section 2. Waterworks and Filtration Plant. There is hereby appropriated the sum of fifteen thousand ($15,000.00), dollars or so much thereof as may be necessary, for the maintenance of the waterworks system and filtration plant.

"Section 3. Interest. There is hereby appropriated from the interest fund the sum of fifteen thousand five hundred dollars ($15,500.00), or so much thereof as may be necessary, for the payment of interest on city bonds and warrants."

Perhaps the most striking feature of this alleged annual appropriation bill is the date of its adoption (December 18, 1897), when considered with reference to the alleged levy of the annual taxes for the same fiscal year, which, as appears, occurred on September 9th preceding the adoption of such alleged appropriation bill. The city charter declares that the annual appropriation bill shall be an ordinance, and further expressly declares that the city tax levy shall be "based upon the annual appropriation bill for the year." Rev. Codes, §§ 2190, 2262. While it is true that the provisions of the statute with respect to the time within which any proceeding connected with the tax levy must be taken are to be construed as directory, and not mandatory, yet it is also manifestly true that the annual appropriation for the fiscal year must precede or be concurrent in time with the levy, since the levy is based thereon, and can lawfully be based on no other foundation. Section 2262 declares: "The city council shall at its regular meeting in September of each year or within ten days thereafter pass an ordinance, to be termed the annual appropriation bill, in which it may appropriate such sums of money as may be deemed necessary to defray all necessary expenses and liabilities of such corporation; and such ordinance shall specify the purposes of which such appropriations are made and the amount appropriated for each purpose. No further appropriations shall be made at any other time within such fiscal year unless the proposition to make each appropriation has been first sanctioned by a majority of the legal voters of such city either by a petition signed by them or at a general or special

election duly called for that purpose." A mere reading of this section of the statute in connection with section 2190, Revised Codes, suffices to demonstrate that the tax levy and the annual appropriation for city expenditures for a given fiscal year are inseparably connected with each other. The right to lay burdens upon property owners by a city tax levy is conditioned by the charter upon the passage of an ordinance which shall specify the several purposes for which the tax to be levied is to be expended, and the specific amounts which shall be devoted to each purpose. The attempted levy of taxes in the City of Grand Forks in 1897 was, therefore, abortive, and without legal validity, because the levying resolution was not authorized or supported by any existing annual appropriation for the expenditures of the city for the then current year. The case falls within the principle laid down by this court in *Shuttuck* v. *Smith*, 6 N. D. 56, 69 N. W. Rep. 5. It follows from what has been said that at the time the contracts in question were entered into the city had not made provision for any expenditure of city funds for the purposes of the contracts, nor had the city levied any taxes to meet the expense and cost of the electric light plant, nor had the city levied any taxes for the ordinary expenses of the year in question. Under the circumstances existing when the contracts were signed, there was no valid tax levy out of which the plant could lawfully be paid for; much less was there any existing levy for the specific improvement which we are considering.

We now turn to an independent ground upon which the illegality of the electric light enterprise is, if possible, more transparently conspicuous. The trial court has found, and the fact is conceded, that a majority of the taxpayers of Grand Forks have never by vote or petition given their sanction to any appropriation for an electric light plant to be owned and operated by the city. The fact is pertinent, because the statute (section 2262) inhibits the city council from making any other or further appropriations of city money for the fiscal year, after the annual appropriation bill has been enacted, without the approval of a majority of the voters. As we have seen, the annual appropriation bill is expressly required to be adopted prior to or at the time of the tax levy, and we have also seen that the statute, by its requirements, stands directly in the way of passing such annual appropriation bill at any later date, and all further appropriations after the tax levy are in terms prohibited by the charter, unless the same have the special sanction of the voters. These provisions of the organic law of the city are unambiguous, and their meaning is not obscure. They plainly show that the alleged ordinance adopted by the city council on December 18, 1897, and denominated an annual appropriation bill for that fiscal year, is utterly void, and in the teeth of express charter provisions declaring that no such appropriation bill could lawfully be enacted by the city council. Section 2262. It is not pretended that the en-

actment of December 18th has ever furnished the basis for any tax levy, or that it is legally possible that it could do so at the time it was adopted. At that time, and long prior thereto, the city and school tax levy for the fiscal year had been certified to the county auditor, and the same were on the tax list, and in the hands of the county treasurer for collection. This alleged annual appropriation, for reasons already stated, is meaningless, and utterly void, inasmuch as it did not and could not, when enacted, furnish a basis for a city tax levy, which, under the charter, is the sole function of an annual appropriation bill for any city which is organized under Chapter 28 of the Political Code. But this belated and abortive measure, even had it been enacted within the limited time, and had the same in fact furnished the foundation for the annual tax levy of September 9, 1897, would not constitute any legal basis upon which the electric light project in question could rest or find warrant of authority. A careful reading of the enactment of December 18th reveals the important fact that the same nowhere undertakes to appropriate any specific sum or amount as an expenditure for an electric light improvement for the City of Grand Forks. Its terms warrant the expenditure of no sum or amount which is stated or made definite. The law requires not only that an annual appropriation bill shall "specify" the purposes for which the appropriation is made, but it must go further and specify "the amount appropriated for each purpose." Rev. Codes, § 2262. The measure we are considering, adopted December 18th, assumed to appropriate $50,000 out of the general fund of the city for the purpose of paying salaries, and the incidental expenses of the city government, including the payment of city orders; and also, incidentally, for the purpose of "defraying the expense of erecting and completing and installing an electric light plant for said city, and the operating expenses of the same during said fiscal year." From this language it appears that, while the city council attempted to appropriate a gross amount ($50,000) from the general fund of the city for certain purposes mentioned, it does not specify the sum or amount which each or either purpose is to receive. From this language it is impossible to determine how much of this appropriation may be expended for any one purpose named in the enactment. We are far from holding that in an appropriation out of the general fund of a city to meet the ordinary expenses incident to carrying on the city government each item of expense must be anticipated, and stated in dollars and cents in the appropriation bill. No such rigid and fanciful requirement as that suggested is made by the law, and we certainly shall not attempt to read into the statute by construction any such embarrassing rule. But a costly improvement such as that contemplated in the contracts in question does not fall within the ordinary operating expenses of a city organized under the Code. The statute differentiates improvements from ordinary expenses, and places them in a class by themselves. The statute meets this

feature of the case by an express provision which forbids the city council or any officer of the city from adding an expenditure upon any "improvement" of the city over and above the amount named in the annual appropriation bill. It declares: "And no expenditure for an improvement to be paid for out of the general fund of the corporation shall exceed in any one year the amount provided for such improvement in the annual appropriation bill." Rev. Codes, § 2263. This language imports that city improvements, such as expensive public buildings, must be provided for in terms and in amount by an ordinance embracing the annual appropriations of the funds of the city. When so mentioned in the annual appropriations, the law, as has been shown, further requires the council to levy the sum appropriated upon the taxpayers of the city, and then no other expenditures therefor can be made until an additional sum is appropriated and levied in the succeeding fiscal year, except by the express sanction of the voters. We can think of no greater abuse of corporate power by the council of a city under the restrictions of said charter than would be involved in expending the funds of a city in the erection of costly public buildings and improvements without either passing an ordinance authorizing the construction of such improvements, or an ordinance appropriating any specific amount to be expended in their construction. The notion can never be tolerated that a city council may, without let or hindrance, from the law or the taxpayer, and at its election, proceed to deplete the general fund of the city by withdrawing therefrom sums of money indefinite in amount, with which to build costly public improvements, which improvements have had no legal authorization either from the council or the taxpayers, and for which no specific sums of money have ever been appropriated or levied. Once concede this power in the council, and it follows as a sequence that any city council may exhaust the general fund at pleasure by expenditures for public improvements which have no legal authorization and for the construction of which no funds have been provided. Fortunately, no such construction of the law is permissible in view of its very explicit provisions to the contrary. The conclusion which follows from the construction we have placed upon the city charter is this, viz: The electric light improvement in question never having been authorized by any legal enactment, and no appropriation therefor ever having been lawfully made, and no levy of taxes to defray the expenses of building and operating the same ever having been made, the expenditures therefor are wholly premature, and totally without warrant of law. The city was without power either to contract for, build, or operate the improvement in question. Section 2264. In short, all of its contracts and disbursements in connection with the plant were contrary to the statute, ultra vires, and therefore void; and hence all further proceedings and disbursements under the contracts should have been enjoined by the trial court.

One further matter remains to be considered. The record dis-

closes that the bids of said contractors to do the work specified in their contracts were accepted on the 18th day of November, 1897, by said city council, and that between that date and the time of the commencement of this action the contractors were not interfered with in any manner by the plaintiffs or others, but were permitted to proceed, and formally enter into said contracts, and thereafter were permitted to enter upon the performance of the work, and enter into divers engagements with other parties for work and material and machinery necessary to the full performance of said contracts. It further appears that said contractors, after their bids were accepted, and in anticipation of litigation to grow out of the enterprise, did do certain work and furnished certain material of small value for the express and avowed purpose of inviting any litigation which the plaintiffs or the public might contemplate on account of said projected enterprise; and that, no suit being brought on such invitation, said contractors did considerable other work before the suit was brought, and had been engaged in the prosecution of the work for the period of about one month prior to the commencement of this action and after the contracts were signed. Upon this state of facts counsel for the city strenuously contends that an equitable estoppel against the public has arisen on account of its laches, which bars this action. It should be borne in mind that the plaintiffs, by this action, are not seeking to vindicate any merely individual rights peculiar to themselves. Plaintiffs appear to have no rights to protect except those common to all the taxpayers of the city. In actions of this character, under the prevailing modern practice, a resident taxpayer is in the attitude of a champion of public interest. The taxpayer here represents the same rights and interests which at common law could only be vindicated at the suit of the commonwealth represented by its accredited representative, the attorney general, or other officer of like authority. As against the public, the doctrine of equitable estoppel by laches is very rarely applied, and then in extreme cases only. See *Schumm* v. *Seymour,* 24 N. J. Eq. 143. The facts of the case at bar certainly furnish no sufficient grounds upon which the defendants can invoke the doctrine of estoppel by laches in the interests of the contractors who are not parties to the suit. Said contractors are in no position to invoke the doctrine for a double reason. They are chargeable with notice that the charter of the city, by its express terms, prohibits the council from entering into any contract for an improvement, or expending any money therefor, unless an appropriation therefor shall have been previously made. Rev. Codes, § 2264. In addition to this statutory notice, it appears that said contractors had been expressly warned that the project of building and furnishing an electric light plant for the city would be resisted, and that, if they attempted to proceed with it, they would be enjoined by the courts. Being thus warned, the contractors did some work on purpose to invite litigation. Under these circumstances it cannot

be urged in behalf of the contractors that they are victims of anything except their own misplaced confidence in promises made in behalf of the city, when both parties to the same were fully aware of their illegal character. Upon this point we quote from the opinion of the Court in one of the cases cited by counsel. *Tash* v. *Adams,* 10 Cush. 252: "All parties, therefore, have acted at their peril, with full and timely notice that the proceedings of the town in appropriating the money were to be drawn in question before the proper tribunal." The contracts with the city for this improvement, made, as they were, in advance of an appropriation or levy of taxes therefor, were of a class of contracts which are expressly prohibited by the charter. Rev. Codes, § 2264. In this class of expressly prohibited contracts the retention of the fruits of the contract does not subject the corporation to liability. *Goose River Bank* v. *Willow Lake School Twp.,* 1 N. D. 26, 44 N. W. Rep. 1002. See, also, *Tennant* v. *Crocker* (Mich.) 48 N. W. Rep. 577; *Bladen* v. *Philadelphia,* 60 Pa. St. 464; *City of Litchfield* v. *Ballou,* 114 U. S. 190, 5 Sup. Ct. 820. Our conclusion is that the learned trial court erred in entering its judgment of dismissal. The judgment will therefore be reversed, and a new judgment entered in favor of the plaintiffs granting the relief prayed for in the complaint. It will be so ordered. All the judges concurring.

ON PETITION FOR REHEARING.

In this case the defendants have filed a petition for rehearing, urging, among other points, that this court should have regard to the motives which petitioners claim have actuated the plaintiffs in bringing this action. Their contention is that the actual plaintiffs are only nominal parties, and that the real party in interest in the background is the Grand Forks Gas & Electric Company, a private corporation, which heretofore has been furnishing light to the city and its inhabitants, and whose business interests, as is claimed, are seriously threatened by the construction of the electric light plant in question. It is true that the evidence tends to show that some of the plaintiffs—not all of them—were influenced by the officers of said corporation in instituting the action, and the question of the plaintiffs' motives was certainly called to the attention of this court upon the argument. In disposing of the case we did not allude to this feature, not because it was overlooked by the Court, as counsel suggest, but for the reason that, in our opinion, the plaintiffs' motives in bringing this action are not pertinent to any issue presented in the case, and hence should properly be excluded from our consideration. If there had been no private corporation within the city whose financial interests were to be incidentally affected by the erection of the electric light plant in question, the grounds of the present action would be unchanged, such grounds not depending at all upon any private interests, but resting wholly upon matters of public concern. The right of a taxpayer to institute an action to

enjoin municipal officers from unlawfully dissipating public funds is a right common to all taxpayers, great and small, and mere private interests are not necessarily involved in suits of this character to any perceptible extent. In the case under consideration, the essential facts being conceded, the only questions to be disposed of by this Court related to the legality or illegality of the contracts in question and of the further expenditure of public funds contemplated as arising out of the performance of said contracts. Whether, in bringing this action, the plaintiffs' motives are laudable or otherwise, is as foreign to the question involved in this record as would be the question of the motives of the defendants, who are officers of the city corporation, in entering into the contracts under the conditions existing at the time the contracts were signed. Motives are often important, but here they cut no figure whatever. The crucial question in the case is one of power. The case necessarily turns upon the answer to the inquiry whether the city officials, in entering into the enterprise of building and equipping the electric plant, did so lawfully, or was their action taken in violation of law? We have discussed this question fully in the opinion handed down, and we shall not reiterate here what was there said further than to observe that reflection has served to strengthen our views upon all of the essential features of the case. The charter provisions which the defendants, as city officials, have seen fit to ignore, or squarely violate, are of a general and fundamental character, and are such as are common to a large number of cities which have already organized under the general law governing the organization of cities in this state, and must govern in the future until repealed. This charter was adopted after mature deliberation, and embraces many checks and safeguards of the highest value to the citizen and taxpayer. If the wise restraints of the city charter here referred to may be set aside at the mere will or caprice of city officials, we are aware of no instrumentalities in the law sufficiently potent to prevent municipal officers, upon any plea of expediency, or to satisfy popular clamor, or at their caprice, from violating the law by diverting the public funds into illegal channels of expenditure.

The petitioners have further reiterated their principal contention upon the argument, to the effect that the taxpayers, who are the plaintiffs, and, perforce, the champions of the public interests, in this case, have, by their delay in bringing this action, been guilty of such laches as should estop them from pointing out the public wrong in question, and demanding that it shall go no further. Answering this position, it will suffice to say that it is unnecessary to hold in this case, that the doctrine of laches, as contended for, can never be invoked in any case of this nature, although we are strongly inclined to that view. In the case at bar the record fails to show that these plaintiffs, or any of them, knew, or were ever advised, at any time prior to the verification of the complaint, that an electric light plant, to be owned by the city, had not been

mentioned either in the annual tax levy or annual appropriation bill for the fiscal year in question. These omissions of the city council are the essential facts upon which the action arose, and with reference to the question of laches the burden is upon the defense to show when these facts became known to the plaintiffs. Until known, time would not begin to run upon which laches could be predicated. Until these vital facts were made known, the plaintiffs, in common with all citizens within the city, would certainly be justified in assuming that any city improvement coming within their observation was one which the authorities had a lawful right to construct. Prima facie, at least, the actions of all public officers with respect to their official duties are supposed to be lawful, and are entitled to be so considered by all persons, until the contrary appears. It follows that plaintiffs are not shown to be at fault in their delay in bringing the action, and hence not shown to be guilty of laches.

The petitioners further contend that, while the illegality of the contracts in question might prevent a recovery in an action at law brought against the city by the contractors for their stipulated compensation for performing the work and furnishing the material for the plant, yet, nevertheless, in a case like this, where the city officers who are defendants are not resisting the payment of the contractors, but, on the contrary, are ready, willing, and anxious to pay them out of the public funds in the treasury of the city, that a court of equity ought not to enjoin such payment. We can conceive of nothing more detrimental to the public interests, and nothing more subversive of the established principles of law and justice, than the rule suggested; and we think no authority can be found to support any such rule. The logic of this contention is that in cases where city officers controlling the public funds have seen fit to enter into contracts in defiance of express charter provisions, and the contractors have performed the work, in whole or in part, it then should be left to the election of such officers to determine whether the public funds should or should not be unlawfully abstracted from the city treasury to pay such contractors, and that in such cases courts of equity should not be permitted to interfere with the plans of such officers by enjoining them from an unlawful disbursement of public money. But, accepting this as a proper exposition of the law applicable to such cases, what becomes of the restrictions which the legislature has seen fit to impose upon municipal officers by way of limiting their powers and regulating the manner of exercising such authority as has been conferred upon them by the legislature? Under the rule contended for, courts of equity must stand aside, and allow that which was unlawfully begun to be completed in defiance of the law. But, fortunately for the cause of law and good government the precise opposite is the settled practice of the courts. It is, and long has been, the conceded province of a court of equity to restrain the unlawful plans and

purposes of public officials in cases where the same threatened in large measure to dissipate the public funds. Such a case is clearly presented by the facts disclosed in the record before us.

The petition is denied. All concur.

(76 N. W. Rep. 292.)

JOSEPH TETRAULT *vs.* A. M. O'CONNOR.

Opinion filed June 20th, 1898.

Trial—Motion for Verdict—Waiver.

A motion for verdict made by defendant at the close of plaintiff's testimony in chief is waived unless renewed after the testimony in the case is closed.

Bona fide Purchaser of Personal Property.

A bona fide purchaser for value of personal property obtains a good title, notwithstanding the fact that his vendor's title may have been obtained by fraud.

Evidence—Opinion of Witness.

The answers to questions, directed to non-expert witness, calling for the opinion or conclusion of the witness, are properly excluded.

Improper Question.

Where a question is so framed that the answer cannot possibly aid the jury, the answer is properly excluded, although the witness was competent to testify on the general subject.

Appeal from District Court, Pembina County; *Sauter,* J.

Action by Joseph Tetrault against A. M. O'Conner. Plaintiff had judgment, and defendant appeals.

Affirmed.

W. J. Kneeshaw, for appellant.

J. D. Stack, for respondent.

BARTHOLOMEW, J. Action of conversion against a sheriff for the value of a stock of goods seized and sold by the officer, but of which plaintiff claims to have been the owner. The officer justified under a writ against plaintiff's vendors. The only issues related to the ownership of the goods and their value. There was a verdict for plaintiff, a new trial was denied, judgment upon the verdict, and defendant appeals.

Plaintiff's vendors had been doing business as merchants. They made an assignment for the benefit of creditors. From that assignment they reserved goods valued at $1,500 as their exemptions under the statute. These goods had been separated from the general stock, but not removed from the building. The building and general stock were in the possession of the assignee. The assignors sold

the property claimed as exempt to plaintiff, by bill of sale, for the sum of $1,000, and plaintiff claims to have taken immediate and continued possession thereof. The defendant denied the bona fides of the sale; claimed that it was made to defraud the creditors of the vendors, and that there had been no change of possession as required by statute, and hence the sale was prima facie fraudulent as to existing creditors of the vendors; and claimed also that the debt upon which the writ against such vendors was based was incurred for property obtained under false pretenses and fraudulent statements

The errors assigned relate to the rulings upon evidence, the refusal of the Court to direct a verdict at the close of plaintiff's testimony, and the order overruling the motion for a new trial. The motion for a directed verdict was waived by not being renewed after the testimony was all in. *Bowman* v. *Eppinger,* 1 N. D. 21, 44 N. W. Rep. 1000; *Colby* v. *McDermont,* 6 N. D. 495, 71 N. W. Rep. 772. The ruling on the motion for a new trial will need no consideration after the discussion of the rulings upon the evidence, as it was practically based thereon.

The trial court excluded all evidence offered by defendant tending to show that the debt to satisfy which the property was seized was incurred by plaintiff's vendors for property obtained by fraud and false pretenses. It is urged that this is error, for two reasons: First, if the property was in fact exempt, there could be no fraud, as to creditors, based upon any transfer thereof. Hence it was material for defendant to show that it was not exempt, and as our statute does not allow general exemptions, as against a debt incurred by fraud or false pretenses, it was proper to allege and prove such fraud. This claim is based upon *Taylor* v. *Rice,* 1 N. D. 72, 44 N. W. Rep. 1017, where, in a somewhat similar case, we held that fraud might be shown to defeat exemptions. And, second, it is urged that among the goods so seized by the officer there were some of the specific goods purchased by plaintiff's vendors from the plaintiff in execution, and, as there was fraud in their purchase, no title passed to the purchaser, and he could give none, and as to such property, at least, the seizure was rightful. The Court instructed the jury that there was no question of exemption in this case, for the reason that plaintiff's vendors had not claimed their exemptions and had them set apart as required by law. It is therefore perfectly clear that there was no prejudicial error in refusing to permit defendant to show fraud in order to defeat exemptions, as the jury were plainly instructed that the property was not exempt in the hands of plaintiff's vendors. As to the second point, defendant seized the goods as the property of plaintiff's vendors. He sold it as their property, and applied the proceeds on their debt. He cannot be heard to say that they never had any title to the goods. But, further, defendant's legal proposition is unsound. If plaintiff was a good-faith purchaser, the title to the property vested in him, not-

withstanding the fact that his vendors' title may have been obtained by fraud. Bigelow, Frauds, 403, and note. In defendant's view of the case, it was important to determine who was in possession of the goods at the time of the seizure by defendant. The Court at all times, on plaintiff's objection, excluded the answer to the direct question, "Who was in possession?" In this there was no error. That was one of the ultimate questions for the jury to determine under the instructions of the court. The circumstances and surroundings were such that different minds might have reached different conclusions. All the facts relative to the location and condition of the goods were shown, as well as all the facts concerning the building, its control, occupancy, and the control of the key. No errors are assigned upon the instructions. We do not know whether the jury found that plaintiff was in actual possession or not. If they did, they were warranted in so doing, under the evidence and the instructions. On the other hand, if they found that the transfer was presumptively fraudulent, under the statute, because of insufficient possession by plaintiff, yet they may have also found that the legal presumption of fraud was fully rebutted by the evidence and the good faith of the transfer established. There was evidence to support such a finding.

The remaining errors relate to the question of value. The evidence, as usual, took a wide range, running from $400 to $2,500. The jury placed it at $1,000. Plaintiff was a competent witness on the point. He was the owner of the goods. He had had some experience in that line. If his experience was shown to be limited, the jury would consider that fact in weighing his testimony. One Murphy was asked, "What, in your opinion was the value, per cent, on the dollar,—the market value,—of the goods in question in Neche at the time of the conversion?" He was not permitted to answer. There was no error. His answer could not have aided the jury. No basis was fixed upon which to calculate the per cent. Whether it was upon the price for which they were purchased, or the price at which they were marked for sale, does not appear. It does appear that the witness never saw the cost inventory, and did not know the selling mark. He was acquainted with the value of the goods, and, if he had been asked to state the value of the goods, his testimony would have been competent. In this case plaintiff's vendors selected from a stock valued at $3,500 what they supposed to be the full amount of their exemptions. The statute allowed them $1,500. They were in no manner restricted in their selections. The evidence shows that they took the most salable goods, and they were acquainted with the value of goods. They had sold $100 to other parties. Had they taken more than the statutory allowance, it would not, under the circumstances, have been surprising, but that they should have made a mistake of $400 against their own

interest is unprecedented. We think the defendant should be well satisfied with the value as found by the jury. But in any event the record discloses no error, and the judgment is affirmed. All concur.

(76 N. W. Rep. 225.)

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY *vs.* CASS COUNTY, *et al.*

Opinion filed June 20th, 1898.

Constitutional Questions—Taxation of Railroads.

Under section 179 of the constitution of this state, which declares that "the franchise, roadway, roadbed, rails and rolling stock of all railroads operated in this state shall be assessed by the state board of equalization," etc., the word "roadway" includes, not only the strip of ground upon which the main line is located, but also all ground necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the objects for which the railroad company was incorporated.

Questions Not Involved Not Decided.

Constitutional questions argued by counsel, but not involved in the case, will not be discussed.

Appeal from District Court, Cass County, *Pollock*, J.

Action by the Chicago, Milwaukee & St. Paul Railway Company against Cass County and others to set aside certain taxes. Plaintiff had judgment, and Cass County appeals.

Affirmed.

Fred B. Morrill, States Attorney, for appellant.

Ball, Watson & Maclay, for respondent.

BARTHOLOMEW, J. Section 179 of the Constitution of North Dakota reads as follows: "All property, except as hereinafter in this section provided, shall be assessed in the county, city, township, town, village or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails and rolling stock of all railroads operated in this state shall be assessed by the state board of equalization at their actual value and such assessed valuation shall be apportioned to the counties, cities, towns, townships and districts in which said roads are located, as a basis for taxation of such property in proportion to the number of miles of railway laid in such counties, cities, towns, townships and districts." Pursuant to this provision, the state board of equalization, in the year 1896, assessed the plaintiff railroad at a certain sum per mile upon its track mileage in the state, and the assessment so made was duly certified as

required by Article 18 of Chapter 18 of the Political Code, being sections 1331 to 1335, inclusive, of the Revised Codes, by the state auditor to the auditors of the various counties into or through which said railroad runs. The said railroad extends into Cass County, and has its present northern terminus in the City of Fargo, in said county. Within said city it has usual terminal facilities, consisting of passenger and freight depots, round house, coal sheds, oil and water tanks, ice house, etc., with proper side tracks and spur tracks for reaching the same. Plaintiff's main track in the City of Fargo runs for the most part upon a public street, but it owns a large number of lots, and an unplatted tract of land adjoining or near to its main track, and it claims that it uses all such real property for purposes directly pertaining to the operation of its road. In 1896 the local assessor of the City of Fargo, on whose assessment the city, county, and state taxes are based proceeded to assess the said lots and the said unplatted tract of land so owned by plaintiff, and the same were placed upon the tax lists and taxes levied thereon. This action was brought to set aside and cancel such taxes on the ground that all of said property had been assessed by the state board of equalization, and that under the constitution the local assessor had no authority to assess the same, said property all being used for railroad purposes and being a part of the roadway of plaintiff. The answer denied that said property was used for railroad purposes, or that it constituted any part of the roadway of plaintiff. There was no other issue made by the pleadings. A trial to the Court resulted in a judgment canceling the tax as to a portion of the property, and refusing to cancel it as to the remainder. The Court canceled the tax as to the entire lot, where it was shown that any railroad building, or any portion thereof, rested upon such lot, and, where there were no buildings, to such portion of the lots as was necessary to give plaintiff a right of way 50 feet in width on each side of the center line of its side tracks and spur tracks. The round house is situated upon the unplatted tract, and for that and spur track leading thereto the court allowed six acres of ground as reasonably necessary for its proper use. The tax was canceled upon one lot upon which there was no structure, and which was touched by no right of way, but the use of which was shown to be reasonably necessary in order to enable the public to reach plaintiff's passenger depot with hacks and conveyances. The County of Cass appeals from the judgment.

It will be conceded that if the word "roadway," as used in section 179 of the state constitution, includes the property here in controversy, then the state board of equalization must consider the value thereof in arriving at the average mileage valuation of the road, and the local assessor would be without authority to assess the same. It becomes important, then, to ascertain the significance of the word "roadway." The same word appears in the same connection in a corresponding section of the Constitution of the State of California

(section 10, Art. 13); and in *San Francisco & N. P. R. Co.*, v. *State Board of Equalization*, 60 Cal. 12, 34, the Supreme Court of that state, in construing this section, said: "The roadway is the right of way, which has been held to be property liable to taxation." And in *City and County of San Francisco* v. *Central Pac. R. Co.*, 63 Cal. 467, after defining "roadbed," the Court say: "The roadway has a more extended signification, as applied to railroads. In addition to the part denominated 'roadbed,' the roadway includes whatever space of ground the company is allowed by law in which to construct its roadbed and lay its track." And this, we think, is the correct and generally accepted definition of the word when used in this connection. While the term "right of way" is generally used to designate the ground upon which a railroad company may lay its tracks and construct its necessary buildings, yet we frequently find the word "roadway" used as synonymous therewith. It follows then that, speaking of geographical extent, whatever is included in the former is also included in the lattter.

The case of *Chicago & A. R. Co.*, v. *People*, 98 Ill. 350, arose on the application of a local tax collector for a judgment for taxes against two certain tracts of land belonging to the railroad company, except a strip 100 feet in width extending through said tracts on which was situated the main line of the road. The evidence showed that outside of such strip the tracts contained about 32 acres of ground. One section of the revenue law of that state (Rev. St. 1874, p. 865, § 41) then in force required the railroad company to "make out and file with the county clerks of the respective counties in which the railroad may be located, a statement or schedule showing the property held for right of way," etc. The next section declared: "Such right of way * * * shall be held to be real estate for the purposes of taxation and denominated 'railroad track' and shall be so listed and valued." By other provisions the "railroad track" was assessed by the state board. The Court said: "What was intended by the enactment of this section of the statute by the use of the words here employed, 'such right of way'? Were these words intended to mean merely the strip of land a certain number of feet wide, upon which the railroad company had constructed its main track, or did the framers of the section intend to embrace, not only the main line of the road, but all side tracks, turnouts, and switches which are connected with the main track, and which are in actual use by the railroad company as a common carrier? We can see no reason why the term 'right of way' should be confined to the land over which the main track of a railroad should be constructed. The land upon which a side track, a switch, or a turnout is built and in actual use by the company, in the business for which it was organized, for all practical purposes is as much held for right of way as is the land upon which the main track is constructed. In the operation of a railroad it is necessary that trains should pass each other, and hence the necessity of turnouts, switches, and side tracks. In

the loading of cars, transfer of cars, the making up of trains, and in innumerable other instances that might be named, in the prosecution of its business as a common carrier, side tracks, switches, and turnouts are as indispensable to a proper transaction of its business as the main track itself. We are therefore of the opinion that the land held and in actual use by a railroad company for side tracks, switches, and turnouts must be regarded, within the meaning of the revenue law, as a part of the right of way of the company. It is used in the transportation of freight, and also for the purpose of carrying passengers, alike with the land upon which the main track is constructed; and upon what principle the land upon which the main track is laid can be held to be right of way, and the land over which a side track, switch, or a turnout passes can be termed something else, we are at a loss to understand." Further along the Court said: "From the evidence, it is manifest that the railroad company has constructed tracks around the entire 32 acres of land; that it is covered with side tracks, switches, and turnouts connected with its main track, and in constant use by the railroad company in the prosecution of its legitimate business as a common carrier, for which it was organized under a charter granted by the state. Buildings have been erected on this land by the company, termed 'machine shops,' 'car shops,' 'round houses,' etc., where repairs are made for the company's rolling stock; but this use does not change the character of the manner in which the land is held. It is still held as right of way, notwithstanding such buildings." This is a later case than *Railroad Co.* v. *Paddock,* 75 Ill. 616, and, if the two are inconsistent, the later case must control, especially as it has been expressly followed and approved in *Chicago & A. R. Co.* v. *People,* 99 Ill. 464. The Indiana statute relating to the taxation of railroads is practically the same as the Illinois statute already referred to. The case of *Pfaff* v. *Railroad Co.,* 108 Ind. 144, 9 N. E. Rep. 93, involved the same question. The Court said: "The important question here is, what is included in the term 'railroad track'? Does that term include the lands described in the complaint, being small tracts of land and lots which are occupied by the side tracks, turnouts, round house, a small repair shop, coal and wood sheds, water tanks, and turntables, etc.?" After referring to certain sections of the statute, the Court say: "The more specific inquiry here is, do the lots and lands described in the complaint and occupied as therein described, constitute a part of the right of way?" After full consideration, the Court answers the question in the affirmative. It refers to the case in 98 Ill. 350, as deciding the same point, and quotes from and approves that case. In some states the exemption from local taxation is held to cover such property, and only such, as might be taken by condemnation proceedings. See *State* v. *Hancock,* 33 N. J. Law, 315; *Milwaukee & St. P. Ry. Co.* v. *City of Milwaukee,* 34 Wis. 271. Among the powers conferred by our statutes upon railroad corporations is the following (subdivision 3, § 2947, Rev.

Codes): "To acquire under the provisions of the statute on eminent domain or by purchase all such real estate and other property as may be necessary for the construction, maintenance and operation of its railroads and the stations, depot grounds and other accommodations reasonably necessary to accomplish the objects of its incorporation." It will not be questioned but that this plaintiff might have acquired by condemnation proceedings, under the chapter on eminent domain, all the real property which the trial court relieved from local taxation in this case. In this state, land that may be acquired by condemnation proceedings by a railroad company exactly corresponds with the broad definition given to the term "right of way" by the Courts of Last Resort in Illinois and Indiana. That under our statutes the term should receive the same construction we have no doubt. The cases cited abundantly demonstrate the necessity, for commercial purposes, of this definition, and this necessity grows more imperative every day. The services which the public expect and demand from the railroad companies constantly grow more onerous. It would, indeed, be a mistaken policy, in our rapidly developing state, to curtail any of the agencies which tend to render this service efficient. We hold, then, that the right of way of a railroad company, or, using the constitutional phraseology, the "roadway" of a railroad company, includes, not only the strip of ground upon which the main line is constructed, but all ground necessary for the construction of side tracks, turnouts, connecting tracks, station houses, freight houses, and all other accommodations reasonably necessary to accomplish the object of their incorporation. Under our constitution, this roadway must be assessed by the state board of equalization, and is not assessable by the local assessor. The evidence shows that all the ground upon which the trial court canceled the local tax comes within our definition of "roadway." Its judgment must therefore be affirmed.

Another question was argued at length, and with much ability, in the briefs of all the counsel in the case, and that is whether or not, under our consitution, the local assessor can assess the improvements on the roadway, other than "roadbed, rails, and rolling stock," separate and apart from the roadway itself. This is a constitutional question of much importance, and perhaps not free from difficulties. It ought not to be decided unless its decision is necessary to determination of the case. Not only do we deem its decision unnecessary in this case, but we cannot conceive how the question can arise on this record. No such assessment of improvements has ever been made or attempted. No action has been brought to cancel any such assessment. The assessment was of lots and parcels of land. It may be that in fixing the value thereof the improvements thereon were considered. But that fact cannot affect our decision. The assessment was of land. If that was assessable, the whole tax must stand. If it was not assessable,—and we hold that it was not,—the whole tax must fall. Should we hold with respondent that the

improvements were not locally assessable, the tax would not the more certainly fall; and, should we hold with appellant that they were locally assessable, the tax would not the less certainly fall, because neither the trial court nor this court could make an assessment or determine the separate value of the improvements. And the tax being unseverable, and a part illegal, the whole must fall. The only possible condition under which the question of the local assessment of improvements could be decisive of this case would be this: If the lands were locally assessable, and the improvements not, then, if the improvements were included, that fact would invalidate the entire tax. But no such claim is made, or could for a moment be made, under our constitution. The proposition of the learned counsel for appellant is exactly the reverse. He contends that, granting that the lands are not locally assessable, yet the improvements are so assessable. The proposition is of no importance in this case.

Affirmed. All concurr.

(76 N. W. Rep. 239.)

OLEA C. HAUG *vs.* THE GREAT NORTHERN RAILWAY COMPANY.

Opinion filed April 28th, 1898.

Carriers—Taking Passenger Beyond Station—Expulsion from Depot—Death By Wrongful Act.

Defendant received plaintiff's husband as a passenger, but negligently carried him by his station. When the train reached the next station he was put off, against his wishes. He was in an imbecile and helpless condition from intoxication, and this was known to defendant's employes. It was late at night, and the weather was stormy and bitterly and dangerously cold. There were no proper accommodations for travelers at the place except defendant's depot, and shortly after entering the same to wait for a train to take him back to his destination, and while conducting himself quietly, he was ejected from the depot, and driven out into the night, with all its perils for a man in his condition. As a consequence, he died from exposure. *Held,* that the defendant was liable in damages to his widow for his death.

Pleading—Allegation of Damages Unnecessary.

In an action brought under the statute by a widow to recover damages for the wrongful killing of her husband, where the complaint shows that the deceased left, surviving him, a widow and minor children of tender years, no specific allegations showing that such widow and children suffered pecuniary damages by the loss of such life are required.

Appeal from District Court, Traill County, *Pollock,* J.

Action by Olea C. Haug against The Great Northern Railway Company, to recover damages, for the death of her husband Jacob C. Haug, alleged to have been caused by the wrongful act of the

railway company. Judgment for defendant on demurrer to the complaint. Plaintiff appeals.

Reversed.

B. C. Ingwaldson, for appellant.

W. E. Dodge, for respondent.

CORLISS, C. J. It is difficult to discover from the complaint or the plaintiff's brief the precise legal theory on which she seeks to sustain this action. Our first impression was against the sufficiency of the complaint, which has been thus far successfully attacked by demurrer. But on a more careful analysis of its averments and after eliminating therefrom all immaterial allegations which tend only to obscure the question of liability, we are convinced that the plaintiff has disclosed a state of facts which establish such a breach of duty on the part of the defendant as renders it responsible to her in damages. The general theory of the action is that defendant's violation of its duty to plaintiff's husband was the cause of his death, and that, therefore, it is bound, under sections 5974-5976 Rev. Codes, to make good to her the damage she has thereby suffered.

As the question arises on demurrer, we are concerned with nothing but the averments of the plaintiff's pleading. Do they state a cause of action? Stripped of all unnecessary verbiage, they are, in substance, as follows: That plaintiff is the widow of Jacob C. Haug; that he left, him surviving, the plaintiff and four minor children, who live with plaintiff; that defendant is a railroad corporation; that on the 2nd day of February, 1895, defendant received plaintiff's husband as a passenger for transportation from Hillsboro to Alton station, in this state; that it negligently carried him by his point of destination; that he was in an imbecile condition from drink, and was helplessly intoxicated, to the knowledge of the defendant and its employes; that on reaching the station next south of Alton, *i. e.* the village of Kelso, the defendant put him off its train, against his wishes; that it was then late in the night, and was stormy and dangerously cold; that at this village there were no proper accommodations for travelers except defendant's depot; that shortly after plaintiff had entered such depot, and while he was quietly waiting for the next train to take him back to Alton, to the knowledge of defendant's agent, and while he was still in such imbecile condition from drink, and helplessly drunk, to the knowledge of such agent, such agent wantonly ejected him from the depot, and drove him out into the night; that it was dangerously and bitterly cold and stormy; that to compel a person, and especially one in his condition, to leave the waiting room, was inhuman, and was to evidently and apparently endanger his life; that plaintiff, so denied all shelter, was forced to and did attempt to walk back towards Hillsboro, the only place where he could find shelter, and

that after hours of walking he finally succumbed to the cold, and died from exposure.

If these facts do not create a liability, it must be because the law deems human life cheap. In the forum of conscience, any human being would be instantly condemned who should treat a helpless drunkard as the deceased was treated by the defendant. The acts of defendant are none the less indefensible because they were performed, as all corporate acts must be performed, by agents. Does, then, the law lag so far behind ethics that conduct like this, which shocks the moral sense, is nevertheless sanctioned by legal principles? We are gratified to find that this question can be answered in the negative. The ground of liability in this case is the disregard by defendant of human life while in the performance of a legal right. When defendant negligently carried plaintiff past the station to which he was bound, it became liable to him for breach of its contract, and was under obligations to return him to that place without charge. But there is no connection between this negligent act and the death which thereafter resulted. Such act was not the proximate cause of his death. Had defendant carried him to a place of safety, and had he died from cold because of his intoxicated condition, no liability would have existed. Nor do we wish to be understood as holding that defendant was obliged to carry him without pay to any point to which he might express a desire to be transported. A traveler who buys a ticket at St. Paul for Minneapolis cannot, when negligently borne beyond his destination, demand that he shall be given a free ride to the Pacific coast. The railroad company has rendered itself liable for its breach of contract, but it has not incurred the obligation to carry the passenger any further than it would be obliged to carry any other passenger who has no ticket and refuses to pay his fare. The duty to carry the traveler, who has been taken past his station through the negligence of the carrier, to a place where his life will not be imperiled, may perhaps be greater than the duty to a willful trespasser, who is conducting himself with violence on the train. But in a general sense, his right to continued transportation is no greater. He must either pay or leave the train when a point has been reached where he will not be exposed to great hazard. Plaintiff in this case cannot complain of the mere fact of the ejection of her husband from the train at Kelso. It is because of the peculiar circumstances surrounding that act, and which made it one necessarily dangerous to human life, when considered in the light of the subsequent conduct of defendant in forcibly removing him from its depot, that the plaintiff may justly hold defendant responsible for the terrible consequences which ensued. To have put him off the train where there were hotel accommodations would have been justifiable, because the defendant was not bound to carry him until he had become sober. Had he, after being ejected at such a place, been run over and killed in the street, or been frozen to death because

of his state of intoxication, defendant could not be held responsible. But no one would contend that it could put him off from the train while in motion. And yet why is this so? The underlying principle applicable in such a case is that a railroad company must not, even when exercising the lawful right of removal, so act as to jeopardize human life. On the same principle, it could not set the passenger out in the midst of a storm on a cold night on the prairie or at a flag station. Neither would the law sanction its act in ejecting him under such circumstances at a station where there were no accommodations for travelers, and where the depot was closed. The defendant in this case owed to plaintiff's husband the duty of carrying him to a point where he, helpless from drink, would not be shelterless against the pitiless fury of a storm, on a bitterly cold night. Whether he was left on the lonely prairie between stations, or at a flag station where there was no depot, or at a village where he could not find shelter except at defendant's depot, which was closed to him or shelter in which was denied to him, the fact would in all the cases be the same,—that it had placed him, a man helplessly intoxicated, to its knowledge, and whom it had negligently carried beyond his destination, in a position from which death or great bodily injury was almost certain to result. The defendant could not expect that a stranger in a place, much less one in such a state of intoxication, would be permitted to enter a private house. It was chargeable with knowledge that his condition was such that he might not even have sufficient control of his faculties to make an effort to do so. It was therefore bound when, despite his protests, it removed him at Kelso, to see to it that the station agent was apprised of the facts, and directed to allow him shelter in its depot until he could be carried back to the place where the defendant should, in the exercise of reasonable care, have originally left him. We do not mean to intimate that it is incumbent upon a railroad company to keep its passenger stations open at all hours of the day and night. And if, under ordinary circumstances, the depot building is closed to the public except when it is necessary it should be open to accommodate the public, no one has any ground for complaint. Assuming that defendant has a right to close its depot as against the general public at the time plaintiff's husband was ejected therefrom, and assuming, further (but the complaint leaves this point in doubt), that what the defendant's agent did in removing her husband was only incidental to the act of closing the depot for the night, yet as against him the defendant had no right to close the depot. When its train reached Kelso with this helpless man on board, because of its own carelessness, it was bound, in view of the climatic conditions and the nonexistence of shelter at that point except in its own depot, to decide whether it would leave him there, in a place of safety, or carry him further, to another place of safety, and, when once it determined to put him off at that point, there sprung up the obligation not to take from him the only shelter the

place afforded. If this shelter was to be denied him, then it was inhuman to drop him at that station at all. It would be in no respect different from leaving him where the depot was already closed, or where there was no depot at all, or at a flag station, or between stations upon a shelterless plain. The wrongful act of the defendant would be in not guarding against the possibility that the station agent, ignorant of the facts, might close the depot, and thrust the unfortunate man, in his helpless condition, out into the dangerous storm. Defendant cannot escape liability because the conductor, without any thought of the dangers of the position of this helpless man, failed to apprise the station agent that the defendant, having carried him by his station, was bound to see that he was not placed in a situation of peril, and that, therefore, he (the agent) must give him shelter in the station. His intoxication was not the proximate cause of his death. It was, it is true, the cause of the defendant being required to exercise greater precaution as to the place of his removal from the train than if he had been sober. The man who voluntarily incapacitates himself by drink is not on this account an outlaw. The law deems his life as precious as that of an Emerson. When the carrier discovers that one helpless from intoxication is upon its train without right, it must, in selecting a safe place to put him off, have regard to his actual condition, physical and mental, without any reference to his responsibility for such condition. The law declares to the carrier that it shall not expose him to great peril even in exercising it undoubted right to eject him; and, in declaring whether he will be subjected to peril, not only must climatic conditions, the propinquity of shelter, and other matters be taken into account, but also the actual state of his mind and bodily health and strength, if known to the agent of the carrier. Though the intoxication of the deceased did cast upon the defendant greater precaution in seeing to it that his life was not imperiled, yet it was not the cause of his death. That cause was the wanton act of the defendant's agent in unnecessarily exposing him, in a state of helpless intoxication, to the cold and storm of a bitter wintry night. The defendant has not even the excuse that it had no chance to prevent his taking passage on its train in this drunken state, for it is averred that his helpless and imbecile condition was known to the company at the time it accepted him as a passenger. There is ample authority for our decision that the facts alleged disclose liability.

In *Railroad Co.* v. *Johnson* (Ala.) 19 South. Rep. 51, it appeared that plaintiff's intestate, who was a passenger on one of its night trains, was very drunk, and refused to pay his fare. Thereupon he was ejected in a cut of the road where there was no escape, except up or down the track, along the sides of which there was room for a person to walk. The night was dark, and it was raining. At the south end there were cattle guards, which could be passed only by walking on the track. Here he was struck, and killed by a train

It was held that the company was liable. The Court said: "If a passenger on a train is intoxicated to a degree to render him unconscious of danger, or he does not possess the power of locomotion, and is put off the train by a conductor on account of his misconduct, and the place where he is put off and left is dangerous to one in his condition, and these facts are known to the conductor, he would be guilty of reckless and wanton negligence, rendering the company in whose employment he is liable for damages resulting from his negligence, although the person ejected and injured might have been legally ejected, in a proper manner and at a proper place. *Tanner* v. *Railroad Co.*, 60 Ala. 621; *Isbell* v. *Railroad Co.*, 27 Conn. 393; *Kerwhaker* v. *Railroad Co.*, 3 Ohio St. 172; *Railroad Co.*, v. *Sullivan*, 81 Ky. 624, 50 Am. Rep. 186; *Johnson* v. *Railroad Co.*, 58 Iowa 348, 12 N. W. Rep. 329; *Kline* v. *Railroad Co.*, 37 Cal. 400; 3 Wood Ry. Law, § § 363, 364; Shear & R. Neg. § 493; 2 Am. & Eng. Enc. Law 748." Again, the Court said: "It is opposed to authority and reason, and the common instincts of humanity, to allow, because a passenger is intoxicated, whether to a greater or lesser degree, and misbehaves in a manner authorizing the conductor to expel him from the train, that such explusion may be made without the exercise of due care for the safety of the passenger, having reference to time, place, and surroundings. If expelled without the exercise of such reasonable care for his life and limb, and he is injured in consequence, the company will be liable, notwithstanding the fact if the passenger had not been drunk he would not has misbehaved, and if he had not misbehaved he would not have been expelled and injured. The right to make reparation rests upon the moral obligation resting upon every one so to exercise his own rights as not to injure another. As was well expressed in *Isbell* v. *Railroad Co.*, supra: 'A remote fault in one party does not, of course, dispense with care in the other. It may even make it more necessary and important, if thereby a calamitous injury can be avoided, or an unavoidable calamity essentially mitigated. Common justice and common humanity, to say nothing of law, demand this; and it is no answer for the neglect of it to say that the complainant was first in the wrong, since inattention and accidents are to a greater or less extent incidental to human affairs. Preventive remedies must therefore always be proportioned to the case in its peculiar circumstances, to the imminency of the danger, the evil to be avoided, and the means at hand for avoiding it.'" When this case was before the Court on a former appeal (16 South. Rep. 75) the Court said: "There is another principle of law to be observed, which requires of all persons, in the exercise of a right or the performance of duty, that it be done with reasonable regard to the preservation of life, and prevention of great bodily harm, or the infliction of unnecessary injuries to others, and they will be held responsible for the manner in which the right is exercised or duty performed. It is an exceptional case where the law does not sub-

ordinate personal rights to the preservation of life. A conductor has the right, under proper circumstances, to eject a passenger from a car; but he would not be justified in exercising this right while the car was at a high rate of speed, or when upon a high trestle, nor would he be justified in putting off a person who was blind or deaf, knowing his infirmity, except at a safe place. Upon like principles, the law would not justify a conductor in putting off a passenger at a time and place, and under conditions and circumstances, which would expose him unnecessarily to great peril of life or bodily harm; and this, too, whether the danger arose from the natural infirmity of the person or was self-imposed. If the conductor did not know of the infirmity of the person and the peril attending the ejection, there would be no liability arising from the exercise of the right and performance of the duty. It is the fact of notice or knowledge of the danger on the part of the conductor, under such circumstances, that constitutes the act culpable or willfully wrong. If the deceased was intoxicated to the degree that he was unconscious of danger,—could not grasp his position and surroundings, and his duty to avoid danger from passing trains,—or did not possess the power of locomotion, and the place where he was put off and left was dangerous to one in his condition, and these facts were known to the conductor, the conductor would be guilty of such negligence as to render the defendant liable for damages resulting from such misconduct, although the deceased may have been a trespasser on the train, and might have been legally ejected, in a proper manner and at a proper place."

In *Railroad Co.* v. *Sullivan,* 81 Ky. 624, 50 Am. Rep. 186, it was held that the defendant was liable when it expelled from its cars, because he refused to pay his fare, a passenger who was helplessly drunk, the defendant knowing of his condition, he being expelled, not at a station, but in the snow. As a consequence of this expulsion at such a place he was severely frozen, and the defendant was held liable therefor.

In *Railroad Co.* v. *Valleley,* 32 Ohio St. 345, the Court said: "It might, perhaps, as far as this case is concerned, be conceded that, if a man were so intoxicated as to be without reason, sense, or intelligence, it would be unlawful, as it would be inhuman, to expel him from cars at night, where he would be just as likely as not to lie down upon the rails and go to sleep. We may concede further, that to put off a drunken man, during a bitterly cold night, in the woods, far from any house, when the probabilities were that he would freeze to death before help could reach him, would be as indefensible in law as it would be wicked and cruel in fact. And, further, to put a man off in a dark night, upon a high railroad bridge, or upon the brink of a precipice, where the first step would be destruction, this could find no justification in law. All this might possibly be."

In *Railroad Co.* v. *Weber,* 33 Kan. 543, 6 Pac. 877, the Court

say, at page 554, 33 Kan., and page 884, 6 Pac. Rep.: "The duty of the railroad company, however, with respect to Weber, did not end with his removal from the train. He was unconscious, and unable to take care of himself. The company could not leave him upon the platform helpless, exposed, and without care or attention. It was its duty to exercise reasonable care and diligence to make temporary provision for his protection and comfort. As was said by the learned Court who tried the case: 'Of course, the carrier is not required to keep hospitals or nurses for sick or insane passengers, but, when a passenger is found by the carrier to be in such a helpless condition, it is the duty of the carrier to exercise the reasonable and necessary offices of humanity towards him until some suitable provision may be made.'"

In *Conolly* v. *Railroad Co.*, 41 La. Ann. 57, 5 South. Rep. 259, and 6 South. Rep. 526, the Court said: "But none of those cases hold that this right of exclusion can be exercised inhumanly, or without due care and provision for the safety and well being of the ejected passenger. On the contrary, the duty of exercising such care and provision is universally recognized."

In *Railroad Co.* v. *Pitzer*, 109 Ind. 179, 6 N. E. Rep. 310, and 10 N. E. Rep. 70, the Court, referring to some of the cases already cited, said: "These are cases—extreme ones, it may be—illustrating the doctrine that regard must be had to the helpless condition of one who enters a railroad train, and that those in charge of the train must do no act which is cruel or inhuman. Granting that these cases are extreme ones, still the general doctrine which they assert is undeniably a sound one, for through all the cases runs the principle that what humanity requires must be done by those who act with knowledge of another's helplessness."

In *Roseman* v. *Railroad Co.* (N. C.) 16 S. E. Rep. 768, the Court said: "But where the power expressly given by law is exercised in such a manner as to willfully and wantonly expose the ejected person to danger of life or limb, the company is still liable for injury or death resulting from the expulsion. Cases falling within this last exception to the general rule, and not intended to be included under the statute, arise where the persons ejected are manifestly too infirm to travel, or too much intoxicated to be trusted to find the way to the nearest house or station. 3 Wood Ry. Law, § 362; 2 Shear & R. Neg. § 493; *Railroad Co.* v. *Wright*, 68 Ind. 586."

In *Brown* v. *Railroad Co.*, 51 Iowa, 235, 1 N. W. Rep. 487, the Court said: "In exercising the right of ejection, reasonable and ordinary care should be employed. In determining whether such care has been exercised all the circumstances should be considered as the physical condition of the person ejected; the time, whether in daylight or late at night; the condition of the country, whether thickly or sparsely settled; the place of the ejection, whether near to or remote from dwellings of any character, including stations; the character of the weather, whether pleasant or inclement, etc. The rules of law, as well as the dictates of humanity, require that

the ejection shall occur at such place, and be prosecuted in such manner, as not unreasonably to expose the party to danger."

Judge Elliott says, in his work on Railroads (section 1637): "If he is so intoxicated or so young or feeble as not to be able to take care of himself or look out for his own safety, the company should exercise reasonable care to see to it that he is not expelled and abandoned in such a place, and under such circumstances, that he will be exposed to unnecessary peril."

All the cases which recognize the right of the carrier to eject the passenger who has no ticket, and refuses to pay his fare, assert that this right must be exercised in such a manner as not to imperil the life of the passenger, or subject him to danger of bodily injury. See, as supporting this principle, the following decisions, which are more or less in point: *Railroad Co.* v. *Glass*, 60 Ga. 441; *Railroad Co.* v. *Gilbert*, 64 Tex. 536; *Railroad Co.* v. *Rosenzweig*, 113 Pa. St. 519, 6 Atl. Rep. 545; *Ham* v. *Canal Co.*, 155 Pa. St. 548, 26 Atl. Rep. 757; *Rudy* v. *Railroad Co.*, 8 Utah 165, 30 Pac. Rep. 366; *Gill* v. *Railroad Co.*, 37 Hun. 107; *Railroad Co.* v. *Skillman*, 39 Ohio St. 444; *Railroad Co.* v. *McDonald*, 2 Willson, Civ. Cas. Ct. App. 144; *Hall* v. *Railroad Co.*, 28 S. C. 261, 5 S. E. Rep. 623; *Wyman* v. *Railroad Co.*, 34 Minn. 210, 25 N. W. Rep. 349. See, also, *Weymire* v. *Wolfe*, 52 Iowa 533, 3 N. W. Rep. 541; *Isbell* v. *Railroad Co.*, 27 Conn. 393.

The complaint shows with sufficient clearness that the death which resulted was proximately caused by the defendant's wrongful act. The order sustaining the demurrer is reversed. All concur.

ON REHEARING.

November 12, 1898.

BARTHOLOMEW, C. J. There is one question involved in this case that was not disposed of in the original opinion. It was not mentioned in oral argument upon the first hearing, and, while it was briefly treated in respondent's brief, yet we overlooked it, and hence, on respondent's petition, we ordered a reargument.

It is urged that the complaint contains no specific allegations showing that this plaintiff or the heirs of Jacob C. Haug have suffered any pecuniary loss or damage by reason of his death, and that only actual pecuniary damages can be recovered in an action of this character, and that the law does not presume damages from the single fact of death; hence, unless the complaint contains specific averments of damages, it fails to state a cause of action. It will be noticed that the cause of action in this case, if any there be, accrued on February 3, 1895. The Compiled Laws of 1887 were then in force. The action was not commenced until 1897. The Revised Codes of 1895 were then in force. The cause of action here sought to be enforced was unknown to the common law, and hence must depend entirely upon statutory provisions, and the provisions giving this right of action, as set forth in section 5499 of the Compiled Laws, differ somewhat from the provisions giving

the right of action, as set forth in section 5974, Revised Codes. We are not prepared, however, to say that the rule of pleading would be different under the one statute or the other. But, if there be a difference in liability under the two statutes, then, clearly, under the provisions of section 5142, Rev. Codes, this action must be regarded as brought under the provisions of section 5499, Comp. Laws, which was in force when the cause of action accrued. That section reads: "If the life of any person or persons is lost or destroyed by the neglect, carelessness or unskillfulness of another person or persons, company or companies, corporation or corporations, their or his agents, servants or employees, then the widow, heir, or personal representatives of the deceased shall have the right to sue such person or persons, company or companies, corporation or corporations, and recover damages for the loss or destruction of the life aforesaid." That was the modified form, in force in this jurisdiction, of Lord Campbell's act, passed in 1846, which first brought causes of action of this character into existence. Statutes based upon Lord Campbell's act are now inforce in nearly or quite all of the states in this Union. This statute has been often before the Courts, and this very question of pleading which we are now considering has been repeatedly passed upon. The question is new in this jurisdiction, and, when we consult the adjudged cases, we find them to be in some confusion, and perhaps some conflict. Difference in phraseology may account in part for the diversity of opinion among judges, but we think there are cases that cannot be reconciled. Upon one point the cases are united, and that is that the only damages recoverable in this action are for the pecuniary loss. Nothing can be recovered for the loss of society or for damages in the way of solatium. But the cleavage in the authorities arises upon the question of the presumption of any pecuniary damages arising from the fact of death.

The first case in England wherein the point arose is *Chapman* v. *Rothwell*, El., Bl. & El. 168. In that case the declaration was filed by the husband, as administrator, to recover damages for the death of his wife. The allegations simply set forth the facts showing the negligence of defendant resulting in the injury and death of the wife, and added: "And the plaintiff, as administrator as aforesaid, claims 200 pounds." There was a demurrer to the declaration. Lord Campbell, the author of the act giving the right of action, was then chief justice. Upon the argument of the demurrer the attorney for the defendant made the statement that "no pecuniary injury is shown to have accrued to the plaintiff." Lord Campbell replied: "The damages might be proved by evidence under this declaration." And Crompton, J., said: "Section 1 appears to contemplate giving damages whenever the party injured could have recovered them, whether nominal or more;" and the point was overruled. It may be that this ruling is to some extent weakened by the language of Baron Pollock in the subsequent case

Wel.

of *Duckworth* v. *Johnson,* 4 Hurl. & N. 653, where he says: "If there were no damages the action is not maintainable. It appears to me that it was intended by the act to give compensation for damages sustained, and not to enable persons to sue in respect to some imaginary damages, and so punish those who are guilty of negligence by making them pay costs." But this language is not necessarily at variance with the decision in *Chapman* v. *Rothwell,* and ought not to be held to establish a diffent rule of pleading. It would therefore seem that in England there need be no special allegations showing damages.

In an early case under the New York statute (*Safford* v. *Drew,* 3 Duer, 627), Justice Duet held that it was necessary, under the statute, to show the existence of parties who were entitled to the benefit of the action, and that such parties had suffered pecuniary loss, and said: "These facts are in their nature material and issuable, and in actions like the present one are, therefore, in my judgment, just as necessary to be proved upon the trial, and, consequently, to be averred in the complaint, as the death of the person injured, and the wrongful act or neglect of defendant as the primary cause." If the able justice intended to say that the complaint must contain specific allegations as to the character of, and reasons for, the damage, then, as we shall see, the case has not been followed in New York. But in *Regan* v. *Railroad Co.,* 51 Wis. 599, 8 N. W. Rep. 292, it was held that the complaint should allege facts showing that a present or prospective pecuniary loss or injury had resulted to the relatives in whose behalf the action was brought, and cited the case in 3 Duer in support of the position. The same rule of pleading under this statute has been adopted in Michigan. *Hurst* v. *Railway Co.,* 84 Mich. 539, 48 N. W. Rep. 44. It should be noted in this case, however, that the action was brought to recover damages caused by the death of an infant less than two years of age. A general allegation of damage was held bad in *Charlebois* v. *Railroad Co.,* 91 Mich. 59, 51 N. W. Rep. 812, where the action was to recover damages for the death of an infant eight years of age. In Texas, also, it is held that the doctrine of nominal damages does not apply. *McGowan* v. *Railway Co.,* 85 Tex. 289, 20 S. W. Rep. 80. In that case it was sought to recover damages for the death of a wife. We do not understand the Supreme Court of Texas to hold that a general allegation of damages is insufficient as a matter of pleading. But it does hold that actual damages must be shown. It is perhaps proper, while the cases are not clear upon the subject, to place Nebraska among the states which require the damages to be specially pleaded. See *Electric Co.* v. *Laughlin,* 45 Neb. 390, 63 N. W. Rep. 941; *Orgall* v. *Railway Co.,* 64 N. W. Rep. 450. And perhaps, also South Dakota. *Belding* v. *Railway Co.,* 53 N. W. Rep. 750.

On the other hand, very eminent Courts have held that a general

allegation of damages was sufficient, under these statutes; that special allegation of damages were not required; and that nominal damages might be recovered. *Railway Co.* v. *Shannon,* 43 Ill. 338; *Railway Co.* v. *Swett,* 45 Ill. 197; *City of Chicago* v. *Scholten,* 75 Ill. 468; *Gorham* v. *Railway Co.,* 23 Hun. 449; *Lehman* v. *City of Brooklyn,* 29 Barb. 234; *Ihl* v. *Railroad Co.,* 47 N. Y. 317; *Oldfield* v. *Railway Co.,* 14 N. Y. 310; *Railway Co.* v. *Weber,* 33 Kan. 543, 6 Pac. Rep. 877; *Johnston* v. *Railroad Co.,* 7 Ohio St. 337; *Nagel* v. *Railroad Co.,* 10 Am. & Eng. R. Cas. 702; *Serensen* v. *Railroad Co.,* 45 Fed. 407; *Kenney* v. *Railroad Co.,* 49 Hun. 535, 2 N. Y. Supp. 512; *Atrops* v. *Costello,* 8 Wash. 149, 35 Pac. Rep. 620; *Barnum* v. *Railroad Co.,* 30 Minn. 461, 16 N. W. Rep. 364.

In *Korrady* v. *Railway Co.,* 131 Ind. 261, 29 N. E. Rep. 1069, Chief Justice Elliot, speaking for the full bench, said: "The appellee's contention that the complaint is bad because it does not specifically show that actual damages were sustained by the widow and infant children of the appellant's intestate cannot prevail. Where a complaint charges a railroad company with wrongfully killing a person, shows that the person so killed was free from contributory fault, and that he left a widow and infant children surviving him, a cause of action is stated, although it is not directly alleged that the surviving kinsfolk sustained actual damages. The legal presumption is that infant children are entitled to the benefit of the father's services, and that the wife is entitled to the benefit of the services and assistance of her husband, and that such services are of value to her and her children."

These citations are sufficient to show that the decided weight of authority is opposed to the rule requiring a specific allegation of damages in order to constitute a good complaint. It is true that some of the cases go upon the theory that, when the wrongful act of the defendant is once established as the proximate cause of the death, the statute then bases a cause of action upon such wrong, and will presume nominal damages. But the more general holding is to the effect that, the wrongful act being once established as the cause of death, the decedent being free from fault, the plaintiff may, under a general allegation of damages, recover all such damages, within the amount claimed, as are ordinarily and usually sustained, from the loss of such life, by those standing in the relation to the decedent sustained by those in whose interest the suit is brought. This holding, we think, violates no rule of code pleading. The defendant is always sufficiently advised as to what he must meet on the question of damages. Any facts or circumstances tending to reduce the pecuniary value of the life destroyed may always be shown. The case of *Atrops* v. *Costello,* supra, well illustrates this principle.

There is a distinction noticed in some of the cases that we think is founded upon reason. When the party in whose interest the suit is brought sustained such relations to the deceased that he

had the legal right to demand the services of the deceased, or to demand support and maintentnce at the hands of the deceased, then substantial pecuniary damages will be presumed; while if recovery is sought by a collateral relative, or one having no such legal claim, and who was not in fact dependent upon the deceased, the presumption of substantial damages may not be indulged. This is illustrated in *City of Chicago* v. *Scholten*, 75 Ill. 468; *Coal Co.* v. *Hood*, 77 Ill. 68; *Winnt* v. *Railway Co.*, 74 Tex. 32, 11 S. W. Rep. 907.

In this case we make our holding no broader than the facts require. The complaint discloses that the deceased left a widow and minor children of tender years. There is a general allegation of damages, but no facts pleaded showing in what such damages consist. The wife and minor children were entitled by law to demand support and maintenance at the hands of the husband and father. When, by the wrongful act of the defendant, they are deprived of that husband and father, the law presumes pecuniary damages, and particular facts showing damages need not be pleaded.

Our judgment of reversal must stand. All concur.

(77 N. W. Rep. 97.)

CHARLES HOLLINSHEAD *vs.* JOHN STUART & CO.

Opinion filed May 27th, 1898.

Negotiable Paper—Implied Notice of Transfer.

A debtor is chargeable with notice of the transfer by his creditor of a negotiable instrument on which he is maker, and thereafter he cannot safely pay the original creditor, although he is ignorant of such transfer.

No Implied Notice of Transfer of Ordinary Debt.

The rule is otherwise as to an ordinary debt.

Payment of Paper Without Its Production.

Whether, however, a debtor ignorant of a previous transfer can make final payment of the principal to one who is not at the time the owner of the claim (such claim being represented by a written instrument), without calling for the production of such instrument, and yet be protected as to such payment, is not decided.

Increased Interest After Maturity—Does Not Destroy Negotiability.

A note otherwise negotiable is not rendered nonnegotiable by the fact that it provides that after maturity the rate of interest shall be higher, or by the further provision that in case of default in the payment of interest the holder of the note may, at his option, declare the whole principal due.

Estoppel Against Owner of Paper.

After the payee of a note, and the mortgagee in the mortgage given to secure the same, had transferred them to another, the debtor, ignorant of such transfer, continued to pay the interest to

the original creditor; and the purchaser, by delivering the interest coupons to such original creditor, to be sent to the debtor by it, instead of sending them directly to the debtor, confirmed the debtor's belief that the original creditor was still the real creditor. *Held,* that the purchaser was estopped from setting up his ownership to defeat the subsequent payment of the principal by the debtor to the original creditor.

No Ostensible Agency Created.

Held, further, that the debtor could not justify such payment on the ground that the purchaser had created an ostensible agency, because it appeared that the debtor did not deal with the original creditor as the agent of the purchaser, or assume that any such agency existed, but, on the contrary, dealt with such orginal creditor solely as the actual owner of the securities.

ON REHEARING.

Payment of Negotiable Paper to Payee Without its Production and After Transfer No Defense.

The fact that an indorsee of a negotiable note with interest coupons attached forwarded the coupon notes, as the interest matured, to the original payee, to be delivered to the maker upon payment, and the further fact that such maker paid such coupon notes with the full belief on his part, but in the absence of all inquiry, that the original payee was the owner thereof, do not estop the indorsee, where the maker paid the principal to the original payee while the note remained in the hands of the indorsee, from setting up the indorsement to himself, or from denying all agency on the part of the payee to collect such note.

Note Payable at Particular Office.

When a negotiable promissory note is made payable at a particular office, such fact does not constitute the party in charge of such office the agent of the holder of such note to receive the money thereon, unless such note is in the possession of such party.

Appeal from District Court, Barnes County; *Glaspell,* J.

Action by Charles Hollinshead against the Globe Investment Company, defendant, to secure the satisfaction of a certain mortgage and for the statutory penalty. John Stuart & Company intervened. Plaintiff purchased the mortgaged premises from William Glass and as part of the purchase price assumed and agreed to pay the mortgage thereon given by his grantor to the Globe Investment Company. Prior to the purchase of said property by plaintiff, the Globe Investment Company had assigned its mortgage to intervener and endorsed and delivered to intervener the notes by it secured. Plaintiff, without knowledge of intervener's ownership of the notes and mortgage, paid the amount secured to the Globe Investment Company. Plaintiff had judgment and intervener appealed.

Reversed.

Morrill & Engerud, for appellant.

The note in this case contains this provision: "If any interest

remains unpaid ten days after it becomes due, the principal shall at once become due, at the option of the holder, without notice." This provision does not render the note uncertain as to time of payment so as to destroy its negotiable character. § 4852, 4861, Rev. Codes; Daniels Neg. Inst. 41; *Wilson* v. *Campbell*, 68 N. W. Rep. 278; *Merrill* v. *Hurley*, 62 N. W. Rep. 958; *Kerr* v. *Morrison*, 25 S. W. Rep. 1011; *Crossmore* v. *Page*, 73 Cal. 213; *Roberts* v. *Snow*, 27 Neb. 425; *Ernst* v. *Steckman*, 74 Pa. 13; *Cisne* v. *Childeston*, 85 Ill. 523; *Charlton* v. *Reed*, 16 N. W. Rep. 64; *Walker* v. *Woolen*, 54 Ind. 164; *Capron* v. *Capron*, 44 Vt. 410; *Palmer* v. *Hummer*, 10 Kan. 464; *DeHass* v. *Roberts*, 59 Fed. Rep. 853; *Chicago, &c.* v. *Bank*, 136 U. S. 268. The transfer of the note carried with it the mortgage. Sec. 4707, Rev. Codes; *Lee* v. *Clark*, 1 S. W. Rep. 142; *Porter* v. *Ourada*, 71 N. W. Rep. 52. After transfer the mortgagee had no right to accept payment of the mortgage debt unless he was agent of the transferee. *Lee* v. *Clark*, 1 S. W. Rep. 142; *Brayley* v. *Ellis*, 32 N. W. Rep. 254.

Possession of the interest coupons for collection is not evidence of authority to collect the principal debt. *Wilson* v. *Campbell*, 68 N. W. Rep. 278; Jones on Mortgages, 964; *Stark* v. *Olsen*, 63 N. W. Rep. 37; *Eggert* v. *Beyer*, 62 N. W. Rep. 57; *Porter* v. *Ourada*, 71 N. W. Rep. 52; *Richards* v. *Waller*, 68 N. W. Rep. 1053; *Joy* v. *Vance*, 62 N. W. Rep. 140; *Brayley* v. *Ellis*, 32 N. W. Rep. 254. If the instrument evidencing the debt is non-negotiable and the debtor, without notice of its transfer, pays the mortgagee, he is protected though an assignment of the mortgage is of record. *Porter* v. *Ourada*, 71 N. W. Rep 52; *Stark* v. *Olsen* 63 N. W. Rep. 37; *Williams* v. *Keyes*, 51 N. W. Rep. 520; *Eggert* v. *Beyer*, 62 N. W. Rep. 57. An equitable estoppel to be available as a defense must be specifically pleaded. 8 Enc. Pl. & Pr. 7; *Parliman* v. *Young*, 2 Dak. 184, 4 N. W. Rep. 711. None of the elements of an estoppel are here present. 7 Enc. Law, 12-17. An estoppel is odious and if anything is left to inference it must be against the estoppel. 8 Enc. Pl. & Pr. 9 & 10. The Globe Investment Company in receiving the money was the agent of plaintiff and not of Stuart & Co. *Stark* v. *Olsen*, 63 N. W. Rep. 37-41.

Winterer & Winterer, for respondent.

The note in this case was not a negotiable instrument within the meaning of the statute. § § 4853, 4854 & 4859, Rev. Codes; *First National Bank* v. *Laughlin*, 4 N. D. 39; *Garretson* v. *Purdy*, 3 Dak. 178, 14 N. W. Rep. 100; *Hegler* v. *Comstock*, 45 N. W. Rep. 331, 1 S. D. 138; *Flagg* v. *School District*, 4 N. D. 30, 58 N. W. Rep. 499. The mortgage and note must be construed together as one contract, and the mortgage contains stipulations destroying its negotiability. *Lockrow* v. *Kline*, 46 Pac Rep. 720; *Brooks* v. *Struthers*, 68 N. W. Rep. 272.

Payment to the original payee of a non-negotiable instrument

without notice of the assignment, will satisfy the liability. *Lockrow* v. *Kline,* 46 Pac. Rep. 720. Intervener failed to record his assignment of mortgage, or to inform plaintiff that he owned the notes. *Jones* v. *Fidelity Loan & Trust Co.,* 63 N. W. Rep. 553, 7 S. D. 122; *Perkins* v. *Matheson,* 19 Pac Rep. 633; *Low* v. *Fox,* 9 N. W. Rep. 131. The privileged character of negotiable paper does not extend to the mortgage by which it is secured. *Hostetter* v. *Alexander,* 22 Minn. 559; *Johnson* v. *Carpenter,* 7 Minn. 176.

CORLISS, C. J. The plaintiff, having once paid the mortgage upon his land, claims by this action a right to have the same discharged of record, and the note and mortgage surrendered to him. The fact of payment is undisputed. So is the fact that the payment was not made to the one who at the time thereof was the owner of the note and mortgage. Plaintiff therefore cannot justify the payment, as to the defendant, unless he can make out a case of estoppel as against such defendant. The note and mortgage were given by William Glass to the Globe Investment Company on the 21st of December, 1891. On the 14th of March, 1892, plaintiff purchased the mortgaged premises from Glass, and in his deed he assumed the payment of such mortgage. On the 26th of December, 1894, plaintiff paid the mortgage to the Globe Investment Company, the original mortgagee; but at this time such company was not the owner thereof, the note and mortgage having been previously transferred to the defendant, John Stuart & Co. Were there no other facts in this case, the payment would not protect the plaintiff against liability to pay the same debt to the defendant. It is true that with respect to ordinary choses in action the rule is that the assignee thereof, if he would prevent payment to the assignor by the debtor, must notify the debtor of the assignment. Any payment made by such debtor in ignorance of the assignment is a good payment of the claim. *Van Keuren* v. *Corkins,* 66 N. Y. 77; *Insurance Co.* v. *Smith,* 2 Barb. Ch. 82; *Reed* v. *Marble,* 10 Paige, 409; *Wanzer* v. *Cary,* 12 Hun. 403; *Bury* v. *Hartman,* 4 Serg. & R. 175; *Brindle* v. *McIlvaine,* 9 Serg. & R. 74; *Hodgdon* v. *Naglee,* 5 Watts & S. 217, 219; *Trustees* v. *Wheeler,* 61 N. Y. 88, 111; *Mitchell* v. *Burnham,* 44 Me. 286, 303, 304. This appears to be the law even in cases where the debt is evidenced by a written instrument. *Van Keuren* v. *Corkins,* 66 N. Y. 77; *Bury* v. *Hartman,* 4 Serg. & R. 175; *Brindle* v. *McIlvaine,* 9 Serg. & R. 74. But see *Brown* v. *Blydenburgh,* 7 N. Y. 141. On this latter point we do not, however, wish to express any opinion. With respect to negotiable paper the rule is different. The maker must, at his peril, ascertain at the time of payment whether the payee is still owner thereof. Although the purchaser of such paper does not notify the debtor of the fact of such purchase, and although the latter is ignorant thereof, still he is, in law, chargeable with notice of the rights of the purchaser, and therefore he pays the original creditor at his own risk. *Porter* v. *Ourada* (Neb.) 71

N. W. Rep. 52; *Eggert* v. *Beyer* (Neb.) 62 N. W. Rep. 57; *Brayley* v. *Ellis* (Iowa) 32 N. W. Rep. 254; *Windle* v. *Bonebroke,* 23 Fed. Rep. 165; *Burnhans* v. *Hutcheson,* 25 Kan. 625.

That the note in question was negotiable, we have no doubt. Its negotiability is attacked on two grounds: First, because it provides for a different rate of interest after maturity; second, because it contains a clause that, in case of default for ten days in the payment of interest, the whole of the principal may, at the option of the holder, become due. We regard it as settled law that the fact that the date of payment may be accelerated by the default of the debtor does not effect the negotiability of the paper. *Chicago Ry. Equipment Co.* v. *Merchants' Bank,* 136 U. S. 268; 10 Sup. Ct. 999; *Merrill* v. *Hurley* (S. D.) 62 N. W. Rep. 958; *Wilson* v. *Campbell* (Mich.) 68 N. W. Rep. 278; *Ernst* v. *Steckman,* 74 Pa. St. 13; *Cisne* v. *Chidester,* 85 Ill. 523; *Walker* v. *Woolen,* 54 Ind. 164; *De Hass* v. *Roberts,* 59 Fed. Rep. 853; 1 Daniel, Neg. Inst. § 48; *Roberts* v. *Snow,* 27 Neb. 425,, 43 N. W. Rep. 241.

It is also clear that the fact that the rate of interest was, after maturity of the note, to be higher, did not render the same non-negotiable. *Merrill* v. *Hurley* (S. D.) 62 N. W. Rep. 958; *Towne* v. *Rice,* 122 Mass. 67; *Parker* v. *Plymell,* 23 Kan. 402; *Hope* v. *Barker,* 43 Mo. App. 632; *Crump* v. *Berdan,* 97 Mich. 293, 56 N. W. Rep. 559.

The note and mortgage appear to have been transferred to the defendant on the 2d of February, 1892. Plaintiff purchased the land, subject to the mortgage, on the 14th of March, 1892. Thereafter he paid the interest each year to the mortgagee, the Globe Investment Company, undoubtedly believing that it was still the owner of the security. He had no knowledge of the transfer thereof to the defendant, and after he had made his first payment of interest, and had obtained the interest coupon, he naturally assumed that he was correct in his belief. Each year's payment of interest could have only one effect; *i. e.* to strengthen this conviction. Who was responsible for this belief? The facts admit of only one answer to this inquiry. The defendant knew that it had not notified the plaintiff of the purchase by it of the note and mortgage. It plainly saw that plaintiff was dealing with the assignor as though it were still the owner of these papers. Each time it delivered to the assignor the interest coupons, on receipt of the money, and suffered the latter to surrender them to the plaintiff. Instead of sending such coupons directly to him itself, and thus dealing with him personally, it did an act which was, to its knowledge, tantamount to a representation by it to the plaintiff that it was not, but that the assignor was, the owner of the obligation. So long as it failed to disabuse his mind of this false impression for which it was responsible, he was justified, as against the defendent, in continuing to deal with the assignor as the real owner. And it follows

that the payment of the principal made by him to the assignor constitutes a good payment of the note and mortgage. Were there no element of estoppel in this case, the plaintiff would have to suffer the consequences of his own carelessness in paying a written instrument without demanding the production thereof at the time of payment; he being chargeable with knowledge of the fact that it might have been previously transferred. But while a purchaser of negotiable paper, and perhaps of any other written instrument, may safely remain silent, and can, despite the silence, insist that payments to the assignor shall not be charged against him, he cannot by his conduct create a belief in the mind of the debtor that the former owner is still the real owner, without being bound by all payments made by the debtor to such former owner while such belief remains unchanged. Our decision rests upon the elementary principle of equitable estoppel. We reach the same conclusion as the learned District Judge, but on a different ground. We are unable to discover in the case any question of ostensible agency. Before the plaintiff can claim that the defendant held the Globe Investment Company out to him as its agent, and therefore is estopped from denying such agency, he must be able to satisfy us that he dealt with such company believing it to be such agent because of the conduct of the defendant. Now, it is obvious from the facts of this case that plaintiff has at no time ever regarded the Globe Investment Company as defendant's agent at all. He has never known the defendant as the principal in the transaction. He has all the time proceeded on the theory, not that defendant was the owner of the securities, and the Globe Investment Company its agent, but that the latter was itself the owner thereof, and the only party interested in the matter, aside from himself.

The judgment of the District Court is affirmed. All concur.

ON REHEARING.

November 9, 1898.

BARTHOLOMEW, C. J. On petition of appellant a rehearing was ordered in this case, and, there having been a change in the members of the Court in the meantime, the case has been again fully agrued upon all points. But, as to all the points except the one hereinafter mentioned, we are satisfied with the opinion as it stands, and shall not notice them further. It is urged upon us, however, that in our former opinion we carried the doctrine of equitable estoppel in pais to an unwarranted length, and that the facts recited in the opinion do not constitute such estoppel, under the circumstances of this case; and, after a very careful consideration of the point, we have reached the conclusion that this contention must be sustained. What we regard as the general rule of law was correctly stated by Chief Justice Corliss in the original opinion, in these words: "Although the purchaser of such [negotiable] paper does not notify the debtor of the fact of such purchase, and although

the latter is ignorant thereof, still he is, in law, chargeable with notice of the rights of the purchaser, and therefore he pays the original creditor at his own risk." The authorities cited abundantly sustain the proposition. The principle has been further illustrated by many cases. *Williams* v. *Walker*, 2 Sandf. Ch. 325, involved kindred questions to those that arise in this case. There the money had been paid by the maker of the bond and mortgage to the solicitor who made the loan, and who for a time held the securities as agent for the payee, and received the interest thereon, but the payee had withdrawn such securities before the payment of principal was made. The payment was made in ignorance of such fact. The decision, as condensed in the syllabus, reads: "The debtor is authorized to infer that the solicitor or agent is empowered to receive both interest and principal, from his having possession of the bond and mortgage. But such inference, being founded upon the custody of the securities, ceases whenever they are withdrawn by the creditor; and it is incumbent upon the debtor who makes payments to the solicitor or agent, relying upon such inference, to show that the securities were in his possession on each occasion when the payments were made." In that case the chancellor reviewed the English and American authorities at length, commencing with *Henn* v. *Conisby*, 1 Ch. Cas. 93, decided in 1668, and following down to the date of the decision (1845); and all the authorities thus reviewed support the conclusion reached, except the single case of *Spencer* v. *Wilson*, 4 Munf. 130, which case, the chancellor says, "is either carelessly reported, or was a loose decision." The matter of hardship in requiring the debtor to pay the same debt twice was as apparent in the case reported in Sanford as in this case. The chancellor said: "This is a case of great and peculiar hardship,—one which I would gladly have relieved against, were it possible, consistent with the maintenance of sound and important rules of equity, and with dispensing exact justice to the equally innocent creditor." No question of negotiability was discussed in that case, and the rule requiring the production of the securities in order to protect a debtor who pays to an agent or a supposed agent applies equally whether the securities be negotiable or non-negotiable Mechem, Ag. § 373, and cases cited; Jones, Mortg. § 964, and cases cited. In *Doubleday* v. *Kress*, 50 N. Y. 410, it was held that possession by a presumed agent of an unindorsed negotiable note was not sufficent to protect the debtor. The case of *Wilson* v. *Campbell* (Mich.) 68 N. W. Rep. 278, is strongly in point. The action was brought by a grantee of the original mortgage to enforce satisfaction of the mortgage of record. The defendant, Campbell, was an indorsee before maturity of the note secured by the mortgage, and held the note and mortgage in his possession. No assignment of the mortgage to him was of record. He forwarded the interest coupons to the Michigan Mortgage Company, Limited, for collection; and the interest was paid to said company by Wilson,

and the coupons delivered to him. Wilson also paid the principal to said company at about the date of the maturity of the note, by executing to said company a new mortgage and note. He testified that he supposed that the Michigan Mortgage Company, Limited, was the owner of the first note. The trial Court held Campbell estopped from denying the authority of the mortgage company to receive the money. The Supreme Court, in reversing the case, said: "In *Williams* v. *Keyes,* 90 Mich. 296, 51 N. W. Rep. 520, we held, following *Dutton* v. *Ives,* 5 Mich. 515, that the holder of a negotiable security is alone the one prima facie entitled to receive the payment, and the maker is not authorized to assume the negotiable paper secured by mortgage has not been transferred. See, also, 2 Jones, Mortg. § 957. However the failure to record the assignment may affect one subsequently deriving title or right through the mortgagee, the maker of a negotiable note secured by a mortgage cannot discharge his liability by payment to one not the holder, or authorized by the holder to receive payment. We are not able to discover that the defendant ever authorized the Michigan Mortgage Company, Limited, to collect the principal of this note, or to collect more than the interest coupons on the same being forwarded to it for the purpose. In this respect the case is so similar to others decided by this Court that we think it unprofitable to discuss this feature here at length. See *Joy* v. *Vance* (Mich.) 62 N. W. Rep. 140, and cases cited; *Bromley* v. *Lathrop* (Mich.) 63 N. W. Rep. 510; *Trowbridge* v. *Ross* (Mich.) 63 N. W. Rep. 534." To exactly the same effect see *Richards* v. *Waller* (Neb.) 68 N. W. Rep. 1053; *Stark* v. *Olsen* (Neb.) 63 N. W. Rep. 37. In *Bronson* v. *Ashlock* (Kan. App.) 41 Pac. Rep. 1068, the note and mortgage were executed by Ashlock. The Guarantee Investment Company was the payee. Bronson was an indorsee before maturity. Hill was Ashlock's grantee. Bronson brought an action to foreclose. Hill answered, setting up payment to the investment company by Ashlock. The evidence showed the payment of the principal to the investment company before maturity. Bronson held the note and mortgage, but forwarded the coupons to the investment company for collection, and upon payment they were delivered by said company to Ashlock. Ashlock had no knowledge of the transfer to Bronson. The trial Court held Bronson estopped by the payment to the investment company. The Supreme Court reversed, and said: "In this case there is nothing to show that the investment company had possession or claimed possession or control of the note and mortgage after their transfer to Bronson in 1887. The payment under such circumstances was made wholly at the risk of the payor." The Court cites a large array of authorities on the point. There is some very pertinent language in *Murphy* v. *Beard* (Mass.) 38 N. E. Rep. 32. There the original maker of the note paid to the original payee, supposing his ownership to continue. The payee had collected

the interest on the note. The maker sought to charge the holder with payment through an authorized, or at least an ostensible, agent. The Court said: "But we need not consider that question, because it does not arise upon the facts. The plaintiff was unacquainted with the fact that the mortgagee was an agent of some owner of the note, and was not thereby induced to make payments. He made them solely because he himself assumed, without inquiry, and without any representations made, and without requiring the production of the note, that the mortgagee continued to be its holder and owner; and he dealt with him as owner, and not as an agent." Again the Court said: "Nor is the case one where, if one of two innocent persons must suffer from the wrongful act of a third, the plaintiff should be relieved from the consequences of his payment to the wrong party. The owner of the note was not the cause of his making the payments, and did not induce him to make them, but he acted solely upon his own supposition that the mortgagee was himself the owner of the note and mortgage."

It has been suggested that the fact that the note in this case was made payable at the office of the Globe Investment Company, in Boston, made that company the agent of any holder of the note for the purpose of receiving payment, if tendered at that office. Such is not the law. If a negotiable note be made payable at a particular place, such provision is so far an agreement on the part of the holder to have the note at the specified place at maturity, that, if the maker be there with the money to make the payment, and make a proper deposit, he is relieved from all further obligation to seek the holder. He cannot be charged with costs, and interest will cease from that date. If the holder has seen proper to place the note in the designated place, then the person in charge becomes the agent of the holder to receive the money and deliver the note to the maker. But, if the note be not so deposited, then no authority exists in the person in charge to receive the money. *Ward* v. *Smith*, 7 Wall. 447; *Pease* v. *Warren*, 29 Mich. 9; Daniel, Neg. Inst. §§ 325, 326. In the case at bar the evidence shows that intervener sent the coupon notes to the Boston office of the Globe Investment Company, and when they were paid said company delivered them to respondent. We may admit that respondent was an entire stranger to intervener, and that he made such payments fully believing that such company was the owner of the note and mortgage. We may go further, and admit that intervener knew, or might reasonably suspect, that respondent was so dealing with the investment company That fact cannot estop intervener. Respondent knew the note was negotiable, and that the quality of negotiability would adhere to it every minute until it reached maturity. He knew it was intended to pass from owner to owner by indorsement, and that it was liable thus to pass at any moment, and he knew that the last person thus receiving it could require at his hands the full amount of the note. That the note belonged,

or he thought it belonged, to the Globe Investment Company when one coupon matured furnished him no warrant for believing that it would belong to the same party when the next coupon matured, or when the principal fell due. He had in his own hands the means of absolute protection. He had only to see to it that he received his note when he paid his money. If he neglected this simple requirement, demanded not more by the law than by common prudence, he paid at his peril; and, if loss occurs, he must bear it. One party or the other must suffer, and he, being the party in fault, must bear the burden.

These views lead to an entirely different result from that heretofore announced. Perhaps we ought to say that the rehearing in this case was ordered largely at the instance of the late Chief Justice Corliss. Before his resignation from the bench he reached substantially the conclusion we here announce. Our former order of affirmation is set aside, and the District Court of Barnes County is directed to enter judgment and decree of foreclosure in the usual form in favor of intervener, John Stuart & Co., Limited, and against the plaintiff, Charles Hollinshead, as prayed in the petition of intervener, with costs of both courts to intervener.

Reversed. All concur.

(77 N. W. Rep. 89.)

WILLIAM H. BEST *vs.* WALTER MUIR.

Opinion filed June 2d, 1898.

Opinion filed on rehearing November 21st, 1898.

Wheat Elevator—General Storage Receipts—Mortgaged Wheat—Replevin.

The owner of mortgaged wheat delivered the same to an elevator, and turned over to defendant, in payment of a claim, the tickets issued by the elevator company. They were general storage, and not special bin, tickets. *Held,* that defendant had no control over the identical wheat covered by the mortgage, or over the mass with which it was mingled, but could only claim from the elevator company the delivery to him of the number of bushels named in the ticket, of the grade therein specified, without reference to the scource from which the company should obtain the grain for delivery. And therefore *held,* that the mortgagee could not maintain replevin against the defendant for the mortgaged wheat, he being neither in the actual nor in the constructive possession thereof.

Appeal from District Court, Cass County; *McConnell,* J.

Action by William H. Best against Walter Muir and others. Judgment for defendants, and plaintiff appeals.

Affirmed.

Newman, Spalding & Stambaugh, for appellant.

It is sufficient if the defendant had constructive possession of the property, that is if it was under his control at the time of demand

so that he could deliver it to plaintiff. *Gallagher* v. *Bishop*, 15 Wis. 303; *Latimer* v. *Wheeler*, 1 Keyes 468; *Dunham* v. *Tray*, 3 Keyes 543; *Bradley* v. *Gamelle*, 7 Minn. 331, 20 Am. & Eng. Enc. L. 1061. If defendant has possession of the property at the time of demand and wrongfully parts with possession before the commencement of the action, replevin can nevertheless be maintained. *Nichols* v. *Michael*, 23 N. Y. 264; *Barnett* v. *Selling*, 9 Hun. 236, S. C. 70 N. Y. 492, S. C. 3 Abb. N. C. 83; *Gassner* v. *Marquardt*, 45 N. W. Rep. 674; *Timp* v. *Dockham*, 32 Wis. 146; *Grace* v. *Mitchell*, 31 Wis. 533, 20 Am. & Eng. Enc. L. 1059 & n. Plaintiff is an endorsee in good faith of the notes before maturity and in the ordinary course of business, and therefore takes the chattel mortgage securing them relieved of equities and defenses. Jones on Chat. Morts. 503; Jones on Morts. § 834; 1 Hillard on Morts. 572, § 65; Coots on Morts 304; Powell on Morts. 908; *Gould* v. *Marsh*, 1 Hun. 566, 15 Am. & Eng. Enc. L. 855, 2 Cobby Chat. Morts. 655; *Graham* v. *Blinn*, 30 Pac. Rep. 446; *Meyers* v. *Hazzard*, 50 Fed. Rep. 155; *Updegraff* v. *Edwards*, 45 Ia. 513; *Dutton* v. *Ives*, 5 Mich. 515; *Helen* v. *Krolick*, 36 Mich. 371; *Webb* v. *Hazelton*, 4 Neb. 305; *Burhans* v. *Hutchinson*, 25 Kan. 625; *Logan* v. *Smith*, 62 Mo. 455; *Hagaman* v. *Sutton*, 91 Mo. 519; *Lewis* v. *Kirk*, 28 Kan. 497; *Gabbert* v. *Schwartz*, 69 Ind. 149; *Muir* v. *Beckshin*, 52 Ind. 149; *Carpenter* v. *Lougan*, 16 Wall. 273; *Dearman* v. *Trimmier*, 2 S. E. Rep. 506.

Pollock & Scott, for respondents.

There is no evidence that respondent had possession of the wheat tickets when this action was brought. Proof of possession in October creates no presumption of possession the following April. *Bethel* v. *Lyon*, 30 N. W. Rep. 84. Replevin will not lie except against one in possession of the property when the action is begun. *Willis* v. *DeWitt*, 3 S. D. 281, 52 N. W. Rep. 1090; *Peale* v. *Garlock*, 28 N. W. Rep. 155; *Davis* v. *Van de Mark*, 25 Pac. Rep. 589; Cobbey on Replevin, § § 431-433. Clark, while the owner of the mortgage, consented to the transfer of the wheat from Ballinger to Muir. Under this parole license the title passed by sale to Muir, released of the mortgage lien. *Frick Company* v. *Western Star Co.*, 32 Pac. Rep. 1103; Cobbey Chat. Morts. § 637. Plaintiff is in no better position than Clark would have been had the mortgage not been assigned. Pomeroy Equity (2d ed.) § § 704 & 1210; *Oster* v. *Mickley*, 28 N. W. Rep. 710; *Kleeman* v. *Frisbie*, 63 Ill. 482; *Bryant* v. *Vix*, 83 Ill. 11; *Baily* v. *Smith*, 14 Ohio St. 396; *Hoogland* v. *Shampanore*, 37 N. J. Eq. 588.

CORLISS, C. J. Plaintiff is seeking to recover the possession of certain wheat, which he claims under a chattel mortgage. The mortgage was given to him by David Ballinger, who raised the grain. Ballinger had a contract with the defendant for the purchase from him of a quarter section of land in this state; and under the contract Ballinger took possession of the land, and raised

thereon the wheat in question. Assuming for the purposes of the disposition of this case that the plaintiff was entitled to the possession of the property at the time the action was commenced, still it is obvious, under the undisputed facts, that he is proceeding against the wrong party defendant. Replevin will not lie against one who has neither actual nor constructive possession of the property. It is true that the property need not be physically within the defendant's possession. It is sufficient if it is within his legal control, although it be actually held by another,—as, for instance, when an agent holds property for his principal. But in the case at bar the defendant neither held the wheat itself, nor controlled the possession thereof. It was delivered by Ballinger to an elevator, and ordinary storage tickets were issued, obligating the warehouseman to deliver to the holder thereof, not the identical wheat, or even wheat from the same mass with which it was commingled, but only an equal amount of grain of the same grade, to be delivered out of any wheat which the warehouseman might have on hand at the time the holder of the ticket should demand performance of the contract. While the tickets themselves were not introduced in evidence, one of the witnesses testified, without objection, as follows: "The tickets issued were storage tickets,—general storage tickets, and not special bin tickets. On these tickets the company would deliver only wheat of the same grade. The wheat could not be identified." The defendant did not take the grain to the elevator, and never exercised any control thereover before it reached such elevator. If he has ever had any control over the possession of the grain, it has been solely by virtue of the tickets issued by the elevator company when the wheat was deposited. What control did those tickets give him over the wheat covered by plaintiff's mortgage? It is not enough that they entitled him to receive from the elevator company a number of bushels of grain equal to that deposited, and of the same grade. The plaintiff is seeking to recover possession of the property on which he held a mortgage, and he must show that defendant at least controls the possession thereof, or of a mass of grain with which the particular wheat has been mingled. If this mortgaged wheat had been placed in a particular bin, with other wheat, and the tickets issued entitled the defendant to take the wheat represented thereby from that particular mass, it might well be said that he had control over the grain mortgaged. But no such case is before us. We take judicial notice of the ordinary course of business in storing grain, and delivering the same upon storage tickets issued therefor. Unless it is stipulated in the contract that the identical grain shall be redelivered, or that grain from the particular mass with which it was mingled shall be redelivered, the warehouseman is at liberty to procure from any source the grain with which to make good his contract. The evidence in the case is explicit that the tickets were general storage tickets, and not special bin tickets, and that they did not bind the

company to deliver the same grain, or grain from the mass with which that grain was mingled, but only the same kind of grain, of the same grade. What control, then, did defendant ever have over the mortgaged wheat which was delivered to the elevator? He could not go with his ticket to the elevator, and demand the identical grain, or insist that the wheat called for by his ticket be delivered to him from the particular mass with which that wheat was mingled. All he could claim was that he be given, from such source as might suit the convenience of the company, the number of bushels of wheat named in the tickets, of the grade therein specified. To say that one so situated with respect to mortgaged property has any control thereover is to confound all legal distinctions. Ballinger, when he directed that certain of the wheat tickets should be issued and delivered to defendant in discharge of his obligations to defendant, turned over to defendant the proceeds of mortgaged property; and it might be that in a proper suit in equity the plaintiff could follow into defendant's hands such proceeds, and subject them to the lien of his mortgage. But this is not such an action. It is an action at law to recover possession of the grain mortgaged, on the theory that defendant has the specific property under his control. If after six months' time the defendant can be said to have constructive possession of the mortgaged property, then his remotest assignee could likewise be said to be in possession thereof at the end of a dozen years. All that defendant did was to accept from Ballinger, in payment of a claim against him, the obligation of the elevator company to deliver to defendant a certain number of bushels of wheat, of a particular grade. There has never been a moment of time during which he has exercised any control over the wheat covered by the plaintiff's mortgage. The elevator company has had possession thereof, and plaintiff could have maintained replevin against it, had he been able to show that, at the time of the commencement of the suit against it, it still had possession of the identical grain, although mingled with other wheat in its warehouse. And, if such company has so dealt with the property that replevin will not lie, then it is liable for the conversion thereof, —provided, of course, the plaintiff is entitled to the possession of the same. That point we do not decide in this case, as the decision thereof is unnecessary. Nor could we here settle it so as to bind a stranger to this suit. We merely assume plaintiff's right to the property, and yet decide that he is proceeding against the wrong party defendant, considering the nature of his action. Plaintiff has at no time evinced a desire to change this action by an amendment of his complaint into an action of a different character. On the contrary, his counsel assert, on the very threshold of their brief in this Court, that it is an action of replevin, and nothing else. We have deemed it unnecessary to cite authorities, for the principles which govern this decision are among the very elements of the law.

The judgment of the District Court is affirmed. All concur.

ON REHEARING.

WALLIN, J. Upon the petition of plaintiff's counsel a rehearing was granted in this action, and the case was again fully argued at the present term. Our views remain unchanged. In the opinion formulated by the late Chief Justice Corliss, this Court said: "Assuming for the purposes of the disposition of this case that the plaintiff was entitled to the possession of the property at the time the action was commenced, still it is obvious, under the undisputed facts, that he is proceeding against the wrong party defendant." This point, being in our opinion well taken, is necessarily decisive of the case. Upon the rehearing, counsel urged that if it be held that the plaintiff cannot recover the grain itself, under the complaint, which is strictly a complaint in replevin, nevertheless, as counsel contend, the plaintiff should be allowed to recover the value of the grain, under the same complaint. Counsel strenuously contend for the liberal rules of construction which prevail in code pleading, and insist that, governed by such rules, the allegations of the complaint are broad enough to allow the plaintiff to recover either the wheat in specie, or its value in money. But it is clear to this Court that the crucial question in this case is not one of pleading. The controlling facts as stated in the original opinion are not in dispute. The defendant at no time had actual possession of the grain covered by the plaintiff's mortgage, and long prior to the commencement of this action the defendant had disposed of the elevator tickets in question. But let us suppose that the complaint was sufficient as a complaint in conversion, and further suppose that plaintiff made demand for the wheat of defendant, and commenced this action, while the elevator tickets still belonged to the defendant and were in his possession. Under these suppositions, could plaintiff recover the value of the wheat? We think not. To recover in such an action, it is incumbent upon the plaintiff to show that the defendant at some time had the actual or the constructive possession of the property. Just here the plaintiff fails in his proof; and this, regardless of any defect in the complaint. The evidence conclusively shows that the defendant at no time had either the actual or the constructive possession or control of the specific grain covered by the plaintiff's mortgage. Defendant at one time had certain elevator tickets, but these would not have entitled the defendant to demand of the elevator company the wheat covered by the plaintiff's mortgage, or any specific wheat. While it is true that under chapter 130 of the Laws of 1887, as amended by section 1 of the Laws of 1889, an elevator receiving wheat for storage becomes a mere bailee of the wheat, yet the bailment is of such a peculiar character that the elevator company can fully discharge its obligations to the ticket holder by a delivery of grain of the same kind, grade, and quantity as that delivered by the bailor. Section 9, c. 130, Laws 1887, declares that "nothing in this section shall be construed to mean the delivery of the identical grain specified in the receipt." It therefore clearly appears that

the defendant, as a storage-ticket holder, did not have any constructive possession of the grain in question, or of any specific grain. Under such circumstances it is entirely clear that an action would not lie against the defendant for the value of the grain covered by plaintiff's mortgage.

(77 N. W. Rep. 95.)

WILLIAM H. BEST *vs.* L. C. BARRETT, *et al.*

Opinion filed June 2, 1898.

Conversion—Elevator Storage Tickets—Identification of Mortgaged Property.

Appeal from District Court, Cass County; *McConnell,* J.

Action by William H. Best against L. C. Barrett and others. Judgment for defendant, and plaintiff appeals.

Affirmed.

Seth Newman and *Newman & Stambaugh,* for appellant.

Pollock & Scott, for respondents.

CORLISS, C. J. This case is controlled by our decision in *Best* v. *Muir,* 8 N. D. 44. The judgment of the District Court is affirmed. All concur.

(77 N. W. Rep. 1117.)

THE SECOND NATIONAL BANK OF GRAND FORKS *vs.* THE FIRST NATIONAL BANK OF ST. THOMAS.

Opinion filed June 4th, 1898.

Opinion filed on rehearing October 7th, 1898.

Attachment of Pledged Property.

The interest of a pledgor in certain bank stock that he had pledged as collateral security for certain indebtedness was subject to seizure in attachment proceedings and sale on execution against such pledgor under the provisions of sections 5363, 5366, Rev. Codes.

Transfer of Pledged Stock Upon the Books.

Certain bank stock was pledged by the owner as collateral security to a debt owing by him to the pledgee, and an absolute assignment of the certificate given. Three years thereafter the pledgee presented the certificate to the bank, and demanded a transfer of the stock on the books, which was refused. Thereupon the pledgee brought an action against the bank, asking that the bank be required to make such transfer, or, on failure, that plaintiff have judgment for the value thereof. *Held*, that plaintiff's money recovery must be limited to its special interest in the property, not exceeding the value of the property, and that before any money judgment could be entered in its favor it was incumbent upon it to establish such special interest.

Rights of Pledgee—Burden of Proof.

And *held*, further, that the pledgee was not entitled as against the bank, which was the owner of the pledgor's interest in the stock, to have the same transferred to it on the books of the bank until it established some beneficial interest in the stock. Wallin, J., dissenting.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by the Second National Bank of Grand Forks against the First National Bank of St. Thomas. Judgment for plaintiff. Defendant appeals.

Reversed.

Bosard & Bosard, for appellant.

Burke Corbet, for respondent.

BARTHOLOMEW, J. These parties plaintiff and defendant are national banks. The controversy is over ten shares of the stock of the defendant bank. This stock was originally issued to one Clarke in one certificate. Plaintiff, claiming to be the owner of the stock by virtue of an assignment to it by Clarke of the said certificate presented the certificate, so assigned, to the defendant bank, and demanded that the said stock be transferred to it on the books of the defendant bank, and a new certificate of stock issued and delivered to it. This the defendant bank refused, claiming to be the owner of said stock by virtue of a purchase upon an execution sale against the said Clarke. It is undisputed that Clarke was indebted to the defendant in the sum of about $2,500, and that defendant

brought an action against Clarke on such indebtedness, and caused a writ of attachment to issue against his property, under which his interest in the stock was seized, and subsequently sold, on an execution issued upon the judgment obtained in such action, and defendant purchased the same. No objection is made to the regularity of these proceedings, but it is claimed that Clarke had no attachable interest in the stock by reason of the fact that it appears that in June, 1893, said Clarke pledged said stock to plaintiff as collateral security for an indebtedness due from Clarke to it, and executed to plaintiff an absolute assignment of the certificate of stock. But section 5363, Rev. Codes, declares: "When property is pledged or mortgaged for the payment of money or the performance of any contract or agreement, the right and interest in such property of the person pledging or mortgaging the same may be attached and sold on execution, and the purchaser at such sale shall acquire all the right and interest of the defendant therein." It follows that under said section Clarke's interest in the stock, whatever it may have been, was subject to seizure and sale, and that such interest became vested in the defendant. In other words, whenever the indebtedness to which the stock was collateral in plaintiff's hands was extinguished, the defendant would be entitled to the stock.

By reason of defendant's refusal to transfer the stock as requested by plaintiff, this action was brought, wherein plaintiff asked that defendant be compelled to transfer the stock and issue the certificate as required, and, in case of failure so to do, that plaintiff have judgment for the value of the stock. The facts render this case peculiar. We find many cases in the books where the pledgor has brought an action against the pledgee for conversion of the pledged property. But, as the pledgee is always in possession of the pledged property, it is ordinarily impossible that the pledgor, or one standing in place of the pledgor, should convert the property to the damage of the pledgee. But, as the wrongful refusal of a corporation to transfer its stock on demand renders such corporation liable for the value thereof (*Doty* v. *Bank*, 3 N. D. 9, 53 N. W. Rep. 77, and cases cited), it follows that in this case that which is ordinarily an impossibility becomes possible.

The trial resulted in a judgment for plaintiff for the value of the stock. There has been much diversity of procedure in cases where a transfer of corporate stock on the books of the corporation has been refused. Mandamus has sometimes been applied for and granted to compel such transfer. *People* v. *Crockett*, 9 Cal. 112; *Turnpike Co.* v. *Bulla*, 45 Ind. 1; *State* v. *First Nat. Bank of Jeffersonville*, 89 Ind. 312; *People* v. *Goss & P. Mfg. Co.*, 99 Ill. 355. We are clear, however, that the weight of authority is against the issuance of the writ, except under special circumstances. *Shipley* v. *Bank*, 10 Johns. 484; *Murray* v. *Stevens*, 110 Mass. 95; *Stackpole* v. *Seymour*, 127 Mass. 104; *Birmingham Fire Ins. Co.* v.

Com., 92 Pa. St. 72; *State* v. *People's Building & Loan Ass'n*, 43 N. J. Law, 389; *Freon* v. *Carriage Co.*, 42 Ohio St. 30; *Tobey* v. *Hakes*, 54 Conn. 274, 7 Atl. Rep. 551. All of these cases are placed expressly upon the ground that the party seeking the remedy has an adequate remedy at law in an action for damages. In many cases, however, a suit in equity to enforce a transfer has been sustained. *Iasigi* v. *Railroad Co.*, 129 Mass. 46; *Cushman* v. *Jewelry Co.*, 76 N. Y. 365; *Walker* v. *Railroad Co.*, 47 Mich. 338, 11 N. W. Rep. 187; *Johnson* v. *Brooks*, 93 N. Y. 337. While these cases announced the principle that a court of equity will entertain an action to enforce the transfer, yet they place it upon the ground of the inadequacy of the common-law remedy in those particular cases. Other cases, however, affix no such limitation upon the equitable jurisdiction to enforce performance. *Bank* v. *Roden* (Ala.) 11 South. Rep. 883; *Railroad Co.* v. *Fink*, 41 Ohio St. 321; In re *Reading Iron Works* (Pa. Sup.) 24 Atl. Rep. 202. And in the *Bank* v. *Roden* and *Reading Iron Works* cases it was held that the prayer might be in the alternative, as in this case. But no question of practice was made in this action. But an action at law for damages is an old and well established remedy of a stockholder in cases of this kind. Cook, Stocks & S. § 392, and cases cited. In such an action the damages are measured by the value of the stock at the time of the demand of the transfer and the refusal. All the cases treat the wrongful refusal to transfer as a conversion, where the stockholder elects to sue for damages. In this case plaintiff has recovered a judgment, according to the findings and the evidence, for the full market value of the stock. But the Court also finds, and such finding is well supported by the evidence, that the stock in controversy was delivered by Clarke to plaintiff on January 5, 1893, as collateral security to an indebtedness then due and owing from said Clarke to the plaintiff. But it will be remembered that plaintiff brought its action as owner, and it proved the execution of the assignment of the certificate to it by Clarke, introduced such assignment, and rested. The fact that plaintiff held the stock as collateral to Clarke's indebtedness to it was shown by the undisputed testimony introduced by defendant. As to whether or not such debt, or any part of it, existed at the time of the trial of this action, in January, 1897, the record is entirely silent. All that we know about the debt comes from the testimony of defendant's cashier relative to a statement made to him by plaintiff's cashier. He testified: "He told me or gave me to understand that they held this as collateral security; that Clarke was owing the bank about six thousand dollars, and this stuff, with some other, was collateral security." As to what has been done with the other security, and as to the present condition of the debt, if any there be, we know nothing. But as plaintiff had not the absolute, but only a special, interest in the stock, its measure of damages was not, necessarily, the value of

the stock, but the value of its special interest therein, which would be measured (speaking without reference to the other security) by the indebtedness to which it was collateral, but not exceeding the value of the property. *Kasper* v. *Walla,* 49 Neb. 288, 68 N. W. Rep. 476; *Seibold* v. *Rogers,* 110 Ala. 438, 18 South. Rep. 312; *Sheehan* v. *Levy,* 1 Wash. St. 149, 23 Pac. Rep. 802; *Sherman* v. *Finch,* 71 Cal. 68, 11 Pac. Rep. 847; *Ganong* v. *Green,* 71 Mich. 1, 38 N. W. Rep. 661; Rev. Codes N. D. § 5002. It is true there is some general language in the books indicating that a pledgee may recover the full value of the stock. See Coleb. Collat. Sec. § 272. But the authorities that sustained that proposition as to a pledgee are cases where the debt exceeded the value of the stock, or where the measure of damages was in no manner raised. We do not believe that the authorities ever intended to make this class of cases exceptional or to depart from the broad general rule of compensation; and certainly this must be true where, as in this case, the party against whom the damages are sought is the party who would be entitled to the surplus over the amount of the indebtedness secured. Of course, we are not speaking of the damages in conversion by a stranger.

Regarding this action, as we must, as an action to recover damages for the wrongful conversion of property in which plaintiff had only a special interest, if anything, as a pledgee, it was incumbent upon plaintiff to establish the amount of such special interest. We think it failed to do this. If it has complied with this requirement, it must be found in the single fact that the proof that it held the stock as collateral came from an admission of the cashier, and coupled with that admission, and as a part of it, was the statement that Clarke owed the plaintiff bank about $6,000, and the bank held this stock and other property as collateral thereto. It will be conceded that this admission must be taken as a whole, and that it establishes, prima facie, that at one time Clarke owed plaintiff bank about $6,000. But this stock was transferred by Clarke in January, 1893, the admission was made in December, 1894; and the case was tried in January, 1897. Does the admission establish an indebtedness from Clarke to plaintiff at the time of the trial? We think not. We recognize the rule that in actions upon contract for the recovery of money, where the making of the contract is admitted and the defendant relies upon payment as a defense, such defense must be specially pleaded. It is also true that the burden of proving payment always rests upon the party pleading it. But these principles are not applicable here. This plaintiff is not suing on contract, but in tort. The burden is upon it to establish, affirmatively, every proposition necessary to sustain a judgment in its favor. And whatever might be the presumption of payment or nonpayment as between Clarke and plaintiff, as against this defendant, who had no connection with the contracts between those parties, no presumption of nonpayment, after the

lapse of all these years, should be indulged. The party on whom rests the duty of payment always knows whether he has performed that duty or not. It is no hardship to cast upon him the burden of showing payment. But it would be impracticable, and probably impossible, for this defendant to show the state of the account between the plaintiff bank and Clarke, who, the evidence shows, was, at the time of the transactions out of which this action grew, an officer in the plaintiff bank. On the other hand, plaintiff knowns whether it has been paid or not. It could reveal the facts instantly, and, upon plain principles of common justice to the defendant, it was bound to do so. But it was silent. While the possession of the collateral may ordinarily be some evidence that the debt is not paid, because in the usual course of business collaterals are taken up when the debt is paid, yet in this instance no importance whatever can be attached to that circumstance. Whatever interest the pledgor had in those collaterals after he had pledged them had passed to the defendant by virtue of the execution sale. He had no interest in taking them up, and the defendant at all times denied plaintiff's right of possession, because no transfer had been made on their books. There was neither evidence nor circumstances raising a presumption of any existing indebtedness when this case was tried. It is true we have found no case holding squarely that it was incumbent upon plaintiff to establish an existing indebtedness, but, in all the cases where the record shows anything on the subject, the plaintiff introduced evidence for that purpose. In *Case* v. *Bank*, 100 U. S. 446, the trial Court instructed the jury that, in order to enable the plaintiff to recover, the jury must be satisfied from the evidence that the debt of the owners of the stock was still due and unpaid, and that if that had not been established the jury must find for the defendant. As the jury found for the pledgee, it was not necessary for the appellate Court to discuss the instruction. In *Dayton Nat. Bank* v. *Merchants' Nat. Bank*, 37 Ohio St. 208-216, the necessity for the ascertainment of the amount for which the stock is held as collateral is also announced. This must be true on general principles; otherwise a Court could never enter an intelligent judgment in plaintiff's favor,—a judgment that would satisfy the great principle of compensation.

As plaintiff failed to show any existing indebtedness, it failed to show any present interest in the stock; hence it cannot ask a Court of equity to decree a transfer to it. The fact that plaintiff, knowing itself to be a pledgee only, brought this action as an absolute owner, trusting evidently to its assignment, and the further fact that, after the evidence showing that it held the stock as collateral only had been introduced in the case, it offered no word explanatory of the nature and extent of its holding, are very significant to our minds as to the merits of the claims of the respective parties. Possibly, on another trial, plaintiff might supply the missing

testimony, but we have no power to order a new trial in this case. We are required to order final judgment. The District Court will set aside its former judgment herein, and enter a judgment dismissing the complaint.

Reversed. All concur.

ON REHEARING.

After the foregoing opinion had been handed down, respondent, on notice, moved this Court for an order remanding the record for amendment. Subsequently, by stipulation, a certificate of the trial judge was filed in the case, to be treated as a part of the original record. From that certificate it appears that, while the testimony in the case was heard by the Court on January 30, 1897, and each party, after the testimony was closed, moved for judgment in its favor, yet the Court took the motions under advisement, and did not then decide the case. Subsequently the respondent was given the privilege of introducing further testimony. No such testimony was ever introduced or offered. Respondent did offer an amendment to its complaint, which the Court disallowed. But the findings of fact were not signed by the judge, or judgment entered, until October 7, 1897. Under this amended record, a rehearing was ordered, and respondent now asks that the former order entered by this Court be vacated, and an order entered directing a new trial in the Court below. Chapter 5, Laws 1897, amends section 5630, Rev. Codes, and confers upon this Court the power to order a new trial in cases tried by the Court where this Court deems such a course necessary to the accomplishment of justice. It may be conceded that this is a proper case for the exercise of that power if the case be covered by the statute. The last sentence of the section, as amended, reads: "This statute shall apply only to cases hereafter tried." The statute was approved on March 12, 1897, and went into effect on July 1st of that year. Was this case tried after that statute went into effect? Our statute (Rev. Codes, § 5419), declares: "A trial is the judicial examination of the issues between the parties, whether they are issues of law or of fact." But what constitutes a judicial examination of the issues of fact? In *State* v. *Hazledahl,* 2 N. D. 521, 52 N. W. Rep. 315, this Court, in construing a statute in the Code of Criminal Procedure, held that the "trial" began after the jury was sworn, and ended with the charge of the Court to the jury. But, as there stated, a broader signification is sometimes given to the word, and it is used to include all the steps taken in a case prior to final judgment. *Jenks* v. *State,* 39 Ind. 9. Again, a "trial" has been defined as "the examination before a competent tribunal, according to the law of the land, of the facts or law put in issue in a cause for the purpose of determining such issue." *Anderson* v. *Pennie,* 32 Cal. 267; *Bullard* v. *Kuhl,* 54 Wis. 544, 11 N. W. Rep. 801. We do not think that under any of these definitions this case was "tried" after July

1, 1897. We are not concerned in holding that the hearing before the competent tribunal constitutes the trial and the whole thereof. That may not be technically correct. But we do assert that it constitutes a part, and a very important part, of every trial. In common parlance, both to the layman and the lawyer, it includes the whole trial. We speak of a case as having been "tried to the jury," or "tried to the Court," meaning simply that the evidence was produced and the arguments made before the jury or the Court, as the case may be. In this case the only examination of the facts before the Court that was ever had occurred on January 30, 1897. The parties then introduced their testimony and submitted their case. True, the case was reopened to permit plaintiff to introduce further testimony, but no such testimony was ever offered. The parties were never again before the Court, so far as the record discloses. It is also true that the findings were not made and filed until in October following. But, under these circumstances, it cannot, with any propriety, be said that the trial of this case was "conducted"—and that is only another form of saying that the case was tried—after July 1, 1897. Such a holding would do unmistakable violence to the plain language of the statute. Our former order must stand.

YOUNG, J. concurs.

WALLIN, J., (dissenting). I find myself unable to agree with the construction given by my associates to the last sentence of the act of 1897, which reads: "This statute should apply only to cases hereafter tried." In my judgment, based upon the facts as stated in the majority opinion, the trial of this action was pending on July 1, 1897, at which date the act became operative. True, there was no evidence actually offered after this date, nor were the pleadings amended, although a proposed amendment to the pleadings was offered by counsel, and thereafter disallowed by the Court. By an express order of the trial Court, the case was held open to permit counsel to offer evidence and submit proposed amendments to the pleadings. Nor did the trial Court render a decision, or file its findings of fact and conclusions of law, until after the law took effect, and not until October, 1897. These facts, from my point of view, make it entirely clear that at the time the act became a law the trial was progressing. Offering evidence and proposing amendments to pleadings are the ordinary incidents attending the trials of issues of fact, and while these proceedings are progressing or may lawfully take place it seems plain that the trial has not been concluded, whether it be pending before a Court alone or before a jury. This being so when the law took effect, the trial of this case was not a past event, *i. e.* the issues had not theretofore been tried. Moreover, in cases tried to the Court, it is a familiar rule of District-Court practice for the trial Court, after the evidence has been taken, in the exercise of judicial discretion, to reopen the case, and

receive further evidence, at any time prior to filing its decision. Under this method of trial, no cause tried in the District Court can be treated as concluded until the decision is filed. Hence, when the act of 1897 took effect, this case had not been tried, and this is true without reference to the express order of the Court holding the case open for the purpose of receiving further evidence and other purposes. By the construction of the act as made by my associates, it is made to read, in effect, as follows: "This act shall not apply to cases the trial of which was commenced prior to July 1, 1897." I cannot so read this statute. The act is amendatory of a statute which did not permit this Court, even in furtherance of the most obvious justice, to order a new trial in the Court below. The amendment of 1897, as its capital feature, removed this restriction, and it is therefore highly remedial in its nature, and as such should, under an established rule of construction, receive a very liberal interpretation, with a view of promoting the beneficent objects of statutes of this character. This amendment declares that the "Supreme Court may, if it deem such course necessary to the accomplishment of justice, order a new trial of the action." This power, it will be noticed, is much broader than the power to grant a new trial for the correction of errors occurring at the trial, as may be done in jury cases. It is conceded in the majority opinion that the ends of justice would be promoted by a retrial of the action. This is also emphatically my view of the record. Nor do I think the statute, when liberally construed, stands in the way of directing a new trial. At most, the statute is obscure in meaning, or, perhaps I should say, silent in its terms, with respect to a class of cases wherein the trial was progressing when the act took effect and was tried in part thereafter. If I am correct in the view I have taken of the language of this statute, a familiar rule of construction should be applied to ascertain its meaning. It is an elementary rule that where a statute is obscure in meaning or ambiguous in its terms, reference should be made to the general scope and purposes of the enactment, and from these endeavor to gather the meaning of those parts of the statute which are obscure or ambiguous. Under this rule, I think a new trial should be granted, because by so doing the remedy of the act can be made effectual in the accomplishment of justice, and, from my standpoint, to direct a new trial would not be to violate any language contained in the statute.

(76 N. W. Rep. 504.)

ANDREW MURI *vs.* JOHN A. WHITE, *et. al.*

Opinion filed October 8th, 1898.

Appeal—Review.

The jury having rendered a verdict on testimony that substantially conflicts, such verdict cannot be disturbed.

Appeal from District Court, Steele County; *Pollock*, J.

Action by Andrew Muri against John A. White and William U. White. Judgment for plaintiff, and defendants appeal. Affirmed.

Morrill & Engerud, for appellants.

George Murray, for respondent.

BARTHOLOMEW, C. J. On October 10, 1895, certain grain in stack belonging to plaintiff was destroyed by fire. Plaintiff brings this action to recover the value of the grain so destroyed, alleging that the fire which destroyed the grain was caused by the careless and negligent operation of a straw burner steam threshing engine, at the time owned and operated by the defendants. The answer denies all carelessness and negligence in the operation of said engine, and denies that the fire that destroyed plaintiff's grain was set by said engine. The trial resulted in a verdict for plaintiff, and defendants bring the case to this court on questions of fact only, and it is urged that the verdict is without support in the testimony. We have studied the evidence with care, and we reach a different conclusion. The witnesses were very numerous, and there is considerable conflict in their testimony. But they agree that it was an exceedingly windy day. It is undisputed that many other machines in that neighborhood stopped running, deeming it unsafe to continue in such a wind. It is not shown that any machine except that of defendants was kept running. This fact alone would warrant a finding that it was negligence on the part of defendants to keep their engine in operation. It is undisputed that live sparks will constantly escape from a straw-burning engine when running, whether the spark arrester be down or not. The wind was blowing from the northwest. The machine was set from northwest to southeast, the engine being northwest of the separator. The exact angle at which the wind would blow and at which the machine was set are matters upon which the witnesses differ. The fire started in or very near to the northeast side of the straw stack. According to some of the witnesses, the wind, assuming that it blew from one point of the compass without variation, would not carry the sparks from the engine so far north. According to other witnesses, it was entirely probable that the flying sparks would reach that point. There was evidence tending to show that one man standing in a wagon near the point where the fire started had been

smoking, and that he knocked the ashes from his pipe. But all this evidence was submitted to the jury under instructions with which defendants are content. Either of these agencies might have produced the fire. It was the duty of the jury to say where the preponderance of the evidence fixed the liability. Their finding cannot be disturbed. The case falls far short of showing that bias or prejudice on the part of the jury that would warrant this Court in setting aside their verdict..

Affirmed. All concur.

(76 N. W. Rep. 503.)

CARL A. KAEPPLER *vs.* CHARLES A. POLLOCK.

Opinion filed October 8th, 1898.

Rule of Court Requiring Filing of Transcript—Void.

A rule of the District Court which requires a suitor who desires a transcript of a portion of the stenographic notes of the testimony given in the case, in order to prepare a proposed statement of the case for settlement, to procure and file with the clerk of the court a transcript of the entire testimony in the case, is in violation of statute, and is harsh and oppressive, and cannot stand.

Mandamus to District Judge—Settlement of Case.

While this court may not, by its writ of mandamus, set aside or cancel a void order made by the district court, yet it may direct the judge of said court to proceed, regardless of such order, to settle a statement of the case in a pending action, according to law.

Original application of Carl A. Kaeppler for mandamus directed to Charles A. Pollock, as judge of the Third Judicial District.

Writ issued.

Morrill & Engerud, for plaintiff.

Ball, Watson & MaClay, for defendant.

BARTHOLOMEW, C. J. This was an original application to this Court by Carl A. Kaeppler for a writ of mandamus directed to Hon. Charles A. Pollock, Judge of the Third District. The application discloses the following facts: Kaeppler brought an action in the District Court of Cass County against the Red River Valley National Bank. The case came on regularly for trial before Judge Pollock and a jury, and resulted in a verdict for the defendant. In due time, plaintiff served notice of his intention to move for a new trial, on the ground of errors of law occurring at the trial in the admission of evidence and in the instructions to the jury, and followed that with the service upon defendant's attorneys of his proposed statement of the case. Thereafter, and within the time for serving proposed amendments to said proposed statement, the attorneys for defendant served upon the attorneys for plaintiff an order to show cause, at a date specified, why an order should

not be entered requiring said plaintiff to file in the office of the clerk of said Court a transcript of the stenographer's notes of the testimony of the witnesses given upon said trial. From the moving papers we learn that plaintiff had procured and filed a transcript of the testimony of certain witnesses, being those whose testimony he desired to embody in his proposed statement of the case. But there were other witnesses who testified at the trial, no part of whose testimony was included in such transcript. It was the claim of defendant's attorneys that they could not intelligently prepare amendments to plaintiff's proposed statement without a transcript of the omitted testimony. On the hearing pursuant to the order to show cause, an order was entered directing the plaintiff to file in the office of the clerk of the Court a transcript of the stenographic notes of the omitted testimony, and the judge declined to proceed with the settlement of the statement of the case until such transcript was filed. Plaintiff seeks at the hands of this court a writ requiring the trial judge to set aside the order last named, and proceed with the settlement of the statement of the case according to law.

In part, the applicant has mistaken the practice. The writ of mandamus is mandatory in character, and of a moving nature. It is not a preventive or corrective writ. It cannot fill the office of an injunction or of an appeal or of a writ of certiorari. This is elementary. See High, Extr. Rem. § 177, and cases cited; 14 Am. & Eng. Enc. Law, p. 93, and cases cited. If the order of the District Court was a discretionary order, such discretion could not be controlled by mandamus before its exercise; much less can the erroneous exercise of that discretion be corrected by that writ. And, if the order was in excess of the jurisdiction of the District Court, then the statute clearly prescribes a remedy by certiorari, when the order cannot be reviewed on appeal. Rev. Codes, § 6098. This Court cannot, by mandamus, act directly upon that order.

But applicant asks that the trial judge be required to settle a statement of the case. This is a duty which the statute specifically imposes upon that official. Rev. Codes, § 5467. The applicant desires to move for a new trial in the case of Kaeppler against Red River Valley National Bank, and he wishes to make such motion on a statement of the case. He has served his proposed statement upon the adverse party, and the time for serving proposed amendments thereto has passed, and yet the judge refuses to settle the statement, unless applicant procures and files with the clerk of the District Court an additional transcript of the stenographic notes covering the testimony of witnesses whose testimony is not included in applicant's proposed statement. Can the judge legally decline to settle the statement for the reason given? We think not. The District Judge bases his action upon Dist. Ct. Rule No. 44, which reads: Transcripts of the stenographic reporter's minutes shall be made in the exact words and in the form of the

original minutes. The party procuring the transcript of the testimoney in any case shall, at or before the time of serving his proposed case or bill of exceptions, file the same with the clerk for the use of the parties to the action, and of the Court." Section 414, Rev. Codes, provides for the appointment of a court stenographer by the judge, and makes him an officer of the Court, holding at the will of the presiding judge. The sections following provide for his taking the testimony in shorthand, and that such shorthand notes, properly indorsed, must be filed in the office of the clerk of the Court where the action is pending, at the conclusion of the trial. Section 417 specifies certain cases wherein the Court may order a transcript of such shorthand notes, or any part thereof, to be made by the stenographer, at the expense of the county, and also declares that "he [the stenographer] shall at any time at the request of any party to a civil or criminal action, upon payment of his fees as provided by law, in like manner transcribe his original minutes or any part thereof taken in such action, and deliver the same to the party ordering such transcript, who may file the same in the office of the clerk whenever he shall so elect." Under this statute the party receiving the transcript may, at his option, file it with the clerk. Under the District Court rule he is required to so file it in all cases where he receives it. To that extent the provision is, no doubt, proper. It throws no additional burden upon the party. It simply requires him to do what comity and professional courtesy between attorneys would suggest. But under the statute, whether all the testimony is ordered transcribed, or only a portion thereof, alike it is denominated a "transcript," and it is the transcript which the party may file with the clerk. If it were our province to construe the District Court rule, we might hold that the word "transcript," as used therein, had exactly the same meaning as when used in the statute; that a party was still left free to order such portion of the testimony as he might elect, and the portion so ordered would constitute the transcript which must be filed. So construed, the rule has already been substantially complied with, and there was no necessity for any further order. But, on the application of opposing counsel, the Court ordered the plaintiff to file a transcript of all the testimony in the case. We are forced to conclude that the Court regards nothing less as a compliance with the rule, and the construction by a court of its own rules is, usually, conclusive upon all other Courts. *Gannon* v. *Fritz*, 79 Pa. St. 303; *State* v. *Smith*, 44 Mo. 112. But, as so construed, the rule takes from a party the clear statutory right to take a transcript of only a part of the testimony if he so desires. Moreover, it is at variance with the whole theory of our practice. The usual object in ordering a transcript is to procure a settled statement of the case. Section 5467, Rev. Codes, declares what a proposed statement must contain. One provision reads: "The objection must be stated with so much

of the evidence or other matter as is necessary to explain it and no more." As this is the proposed statement, of course the party preparing it must judge for himself what evidence he needs therein. Again, in the same section: "It is the duty of the judge in settling the statement to strike out of it all redundant and useless matter and to make the statement truly represent the case notwithstanding the assent of the parties to such matters." The rule as construed conflicts directly with the spirit of these provisions. Again, it oppressively burdens the right of appeal,—a right that should be left as free and untrammeled as justice will permit. It not unfrequently happens that, while the testimony in a case may reach large proportions, yet the single alleged error that a party wishes to present to an appellate Court may be explained by one page of that testimony; yet, under this rule, before that error can be presented, the party must, at his own expense, produce a transcript of the hundreds of now useless pages of testimony that are in the record. To an impecunious suitor this is an intolerable hardship. It is no answer to this position to say that, if he succeeds in his appeal, the expense can be taxed up to the other party, as disbursements. He must advance the money, which, under most favorable conditions, will not be returned for months. His adversary may likewise be impecunious, so that it can never be recovered, or he may fail on appeal, and be left to bear the entire expense, however useless it may have been, because it was the rule of court that compelled the useless expense, and not his adversary.

That it is not competent for the trial Court, by rule or otherwise, to require one party to produce a transcript of the entire testimony in the case, at the instance or for the benefit of his adversary, is to our minds perfectly clear. The point is perhaps closer where, as in this case, the trial judge states that he cannot properly settle and certify the statement of the case without the transcript of the testimony of other witnesses. But we do not think the law is different. The statute, in mandatory terms, requires him to settle the statement. It does not in that connection say by what method he shall reach the settlement. If the respective attorneys have honestly performed their duties,—the one in preparing a statement, the other in preparing amendments thereto,—the task of the trial judge can seldom be arduous, and the law gives him all the means for the proper performance of that task. The stenographic minutes of all the testimony is on file with the clerk of the Court. The judge can at any time require the stenographer to read the testimony, or any disputed portion of it, to him, or to make a transcript for his use. A few moments, or, at most, a few hours, of time, is all that is required. The fact that the statute fixes no compensation to the stenographer for such services is of no consequence. He knows such services may be required of him, and he accepts the office cum onere. The hardship is imaginary, rather than real. Court stenographers often render such services, and no complaint

is heard from them. We do not think the judge, any more than the adverse party, has power to throw upon a suitor the burden of a transcript which such suitor does not desire. The rule, as interpreted by the Court, violates the statute, and is harsh and oppressive. It cannot stand.

It follows from what has been said that no valid excuse for not proceeding to settle a statement of the case in the case of Kaeppler against the Red River Valley National Bank has been presented; and while this Court may not, in this proceeding, set aside the order requiring a full transcript, although void, yet it is our duty to require the trial Court to disregard such order. We must not be understood as in any manner curtailing the power of the trial Court to extend the time for serving proposed amendments to the proposed statement. But a writ of mandamus will issue from this Court requiring the Honorable Charles A. Pollock, judge as aforesaid, to settle a statement of the case in the action named, according to law. It is so ordered. All concur.

(76 N. W. Rep. 987.)

B. J. HOWLAND *vs.* R. N. INK.

Opinion filed October 10th, 1898.

Appeal—Review of Evidence.

In cases tried by a jury, the Appellate Court will not examine the evidence further than to determine whether it is sufficient to sustain the verdict.

Evidence Sustains Verdict.

Evidence examined, and found sufficient.

Appeal from District Court, Richland County; *Pollock*, J.

Action by B. J. Howland against R. N. Ink for an account for legal services. From a judgment for plaintiff, defendant appeals. Affirmed.

W. H. Redmon, for appellant.

B. J. Howland, in pro. per.

YOUNG, J. This action is based upon an account. Plaintiff obtained a judgment in a Justice Court of Richland County, from which an appeal was taken to the District Court, where he had a verdict. Defendant's motion for a new trial was overruled, and judgment was entered for plaintiff. Defendant now appeals to this Court. The instructions to the jury were not excepted to. Upon the record as it stands, but one question is to be determined by us, viz. is the evidence sufficient to justify the verdict?

Briefly stated, the uncontroverted facts are as follows: Defendant, Ink, was indebted in the sum of $250 upon an account for legal services to the law firm of Howland & Redmon, which was composed of the plaintiff, B. J. Howland, and W. H. Redmon. This

firm began business as such, in Wahpeton, in May, 1896. On November 1, 1896, the defendant, Ink, also an attorney, became associated with them, the firm name thereafter bearing the title of Redmon, Howland & Ink; but, by mutual agreement among themselves, the defendant, Ink, was not to share in the firm's profits or losses, or have any interest in the business, until further arrangements, which do not appear to have been made. On February 20, 1897, Redmon and Howland, by a written agreement over their individual signatures, dissolved their partnership, and provided therein generally for the division of the firm assets, including office furniture, notes, and accounts, not, however, enumerating or designating the particular items; also providing that their clients might select either one of the firm to conclude pending litigation. Among the accounts then due the firm was the $250 account of the defendant. Plaintiff, as for right to recover, alleged that, at the time of the dissolution of the partnership, this account was divided by specific agreement between himself and Redmon, $125 to be paid to him, and a like amount to Redmon, and that the defendant, Ink, assented to this division. This the defendant denied, but admitted the indebtedness as an existing one, but to the firm of Howland & Redmon. Upon the issue thus joined, the case was submitted to a jury, resulting in a verdict for plaintiff for $125.

Under the pleadings and instructions of the Court, which were not challenged by exceptions, the verdict hinged solely upon their finding as to the division of this account. Howland testified positively that it was divided, and with the assent of defendant; also to subsequent promises by defendant to pay it; and to some extent he was corroborated by the evidence of other witnesses. Both Redmon and Ink, on the other hand, with equal emphasis denied the division. Thus, upon this one point, which, under the pleadings and instructions, determined plaintiff's right to recover, there was a square conflict in the evidence. It is not for us to conjecture whether we might have returned a different verdict. It is well settled that in cases tried by a jury, where the evidence is conflicting, the appellate Court will not weigh the evidence, or go further than determine therefrom whether or not the party has given sufficient legal evidence to sustain his verdict. Clearly, there was sufficient evidence to support the verdict returned. The lower Court did not err in overruling the motion for new trial.

Judgment affirmed. All concur.

(76 N. W. Rep. 992.)

DANIEL DIVET *vs.* RICHLAND COUNTY.

Opinion filed October 10th, 1898.

Subject of Act Must be Expressed in Its Title.

Chapter 126, Laws of 1897, construed with reference to its title. The title of Chapter 126, Laws of 1897, after eliminating its repealing features, reads as follows: "An act prescribing the mode of making assessments of property, the equalization of and the levy and collection of taxes, and for all other purposes relative thereto." *Held*: First, that the subject of the enactment as stated in its title is that of taxation for the public revenues, and that only; second, that the words, "and for all other purposes relative thereto," do not enlarge the subject of the statute.

Constitutional Law—Recovery of Taxes Paid.

Section 88 of said chapter examined, and, in so far as the same authorizes the recovery of taxes paid into the county treasury prior to the passage of the act, upon land exempt from taxation, *held*, that the section is unconstitutional under the provision of section 61 of the state constitution, in this: that the right to recover taxes paid into the county treasury for the use of private persons by actions is a matter wholly foreign to the subject and purposes of the act as the same are set out in its title.

Appeal from District Court, Richland County; *Lauder*, J.

Action by Daniel Divet against Richland County, North Dakota, for a refund of taxes paid. From a judment for defendant, plaintiff appeals.

Affirmed.

S. H. Snyder and *B. L. Bogart*, for appellant.

Plaintiff's right to recover is not barred by the statute of limitations. The time of limitation commenced when the cause of action was first subjected to the operation of the statute. *Sohn* v. *Waterson*, 17 Wall. 596; *Trustees* v. *Arnold*, 58 Ill. App. 103; *Weiser* v. *McDowell*, 61 N. W. Rep. 1094; *Berry* v. *Berry*, 22 S. W. Rep. 654; *Mills Co.* v. *Lampassas Co.*, 40 S. W. Rep. 552. The statute does not begin to run until there is some one in whom the right of action is indubitably vested. *Com.* v. *McGowan*, 17 Am. Dec. 737; *Ruff* v. *Bull*, 16 Am. Dec. 290; *McDonald* v. *Walton*, 14 Am. Dec. 318. All matters fairly and reasonably connected with the general subject of the act, and all measures which may facilitate its accomplishment are proper to be incorporated in the act and are germane to the title. In re Knaust 101 N. Y. 194; *State* v. *Cassidy*, 22 Minn. 312; *State* v. *Haas*, 2 N. D. 203. For illustrations of this rule see *Pierce* v. *Smith*, 29 Pac. Rep. 565; *Dorchester Co.* v. *Meekins*, 50 Md. 39; *State* v. *Woodmansee*, 1 N. D. 246, 46 N. W. Rep. 970; *Travelers' Ins. Co.* v. *Oswego*, 59

Fed. Rep. 58; *State* v. *Mines,* 18 S. E. Rep. 470; *Tillotson* v. *Gage,* 56 N. W. Rep. 954.

P. J. McCumber, for respondent.

The title to the act, Ch. 126, Laws 1897, is clearly prospective, and it cannot support a retroactive subject. Sec. 61, Const. *Tyler* v. *Cass Couny,* 1 N. D. 369, 23 A. & E. Enc. L. 232; *State* v. *Clinton,* 27 La. 40; *People* v. *Congdon,* 77 Mich. 351; *Carr* v. *Thomas,* 18 Fla. 736; *Ives* v. *Norris,* 13 Neb. 252; *People* v. *Phippin.* 70 Mich. 6; *Messinger* v. *State,* 25 Neb. 674; *Thomas* v. *Collins,* 24 N. W. Rep. 555; *People* v. *Hull,* 9 Pac. Rep. 34; *State* v. *Morgan,* 48 N. W. Rep. 314, Suth. St. Con. § 102, Cooley Const. Lim. (5th Ed.) 173. Plaintiff is barred by the statute of limitations, § § 5184, 5200 and 5201, Rev. Codes. This statute applies to counties, 13 A. & E. Enc. L. 714; *Baxter* v. *State,* 10 Wis. 454, 15 Wis. 488, S. C. 17 Wis. 588.

WALLIN, J. In this action the facts are uncontroverted, and only a question of law is presented for determination. The plaintiff is seeking to recover from the County of Richland sums of money, with interest thereon, paid by the plaintiff to the treasurer of said county as taxes for the years 1880, 1883, 1885 and 1886. Said taxes were assessed against a certain section of land in that county, which was held by the plaintiff under and by virtue of a conveyance made to the plaintiff by the Northern Pacific Railroad Company, and was land commonly known as "indemnity land." The fact is stipulated that at all times in question said land was exempt from taxation, and that the alleged taxes so paid by plaintiff were illegal and void. It is conceded by counsel for the plaintiff that prior to the enactment embraced in chapter 126 of the Laws of 1897 the plaintiff was remediless, and that an action would not lie to recover from the county the taxes so paid by plaintiff, or any part thereof. The action is based wholly upon the provisions of section 88 of said chapter 126, and particularly upon the following language therein: "And in cases where taxes have been or may be paid on lands not subject to taxation * * * the money so paid and all subsequent taxes, penalties and costs which have been, or which may be paid, shall be refunded, with interest at seven per cent. per annum from the date of payment, to the person making such payment, his heirs or assigns, and the same shall be refunded out of the county treasury to which such money was paid," etc. In this Court counsel for the defendant has made three points against the plaintiff's right to recover. He claims, first, that section 88 of said chapter is unconstitutional, and hence void, because it is a total departure from the subject of the law as set forth in its title, and therefore violates section 61 of the constitution of the state. It is claimed, secondly, that, inasmuch as it appears from the complaint that none of the sums paid out as taxes by the plaintiff were paid within a period of 10 years prior to the commencement of the action, said payments are outlawed, and recovery on the whole of them is barred under the general statute of limitations. The third point is

that the act is prospective in its operation, and does not, therefore, warrant a recovery upon any cause of action arising prior to the passage of the act.

Inasmuch as this court is unanimous in holding that the judgment of the Court below must be affirmed upon the ground stated in the first point made by counsel, as above stated, it will be unnecessary, in deciding the case, to further mention the other grounds. We hold that section 88 is unconstitutional, because it is a wide and radical departure from the subject of the law as that subject is set forth by its title. Eliminating from the title its repealing features, which are entirely irrelevant to the question we are discussing, the title reads, "An act prescribing the mode of making assessments of property, the equalization of and the levy and collection of taxes and for all other purposes relative thereto." Section 61 of the state constitution provides: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." Reverting to the title of the statute as above quoted, we discover that it relates to the subject of taxation, and to that alone. In short, it relates to the subject of the assessment of taxes, the equalization of such assessments, and the levy and the collection of the taxes for the public revenues, and this to the exclusion of all other matter whatever. The words "and all other purposes relative thereto," found in the title, while unnecessary, in our judgment, are nevertheless of plain and obvious meaning. They embody an express notice to all interested parties that the act will embrace other matters not in terms expressed in the title, but which other matters are germane to the subject of the law as expressed in plain terms in the title of the act. These general words, while wholly unnecessary to the constitutional validity of the title, are nevertheless not at all misleading. These words need not have been added, however, because the legislature, having clearly indicated the subject of the enactment by the preceding words in the title, were possessed of full constitutional power to place in the body of the law any matter or provision which, by any fair construction, would relate to the subject of the act as stated in terms in its title. An inspection of chapter 126 discloses the fact that it embraces 110 sections, exclusive of the emergency section. It is a comprehensive tax law, and in terms repeals a mass of other laws, which, until repealed, were the statutes of the state regulating the whole subject of assessing, levying, and collecting the public revenues by taxation. With the exception of section 88 of chapter 126, the entire law relates to levying and collecting the taxes for public purposes, and to that subject only. Turning now to section 88 of the statute, we discover that, except in one feature,—that authorizing a re-assessment in cases where sales made and deeds issued pursuant to this act are adjudged void,—the section has nothing whatever to do with either taxation or the public revenue. With the exception stated, the entire section is devoted

to the creation of causes of action in favor of taxpayers and against counties, for which judgment may be obtained for the use of private persons. Instead of being in furtherance of any of the purposes of the act, as such purposes are set out in its title, section 88, with the exception stated, is in direct opposition to all of such purposes. With the exception stated, the section not only has nothing whatever to do with the assessment, levy, or collection of taxes, but, on the contrary, its purpose is to deplete the public treasury of money derived from taxation in the interest of private parties. With the exception stated, we regard the purposes of section 88 as being entirely foreign to the subject of the law as expressed in its title, and hence, to that extent, repugnant to the constitutional provision above cited. We concede that this constitutional provision has uniformly received a liberal construction by the Courts, and this Court has held in another case (*State* v. *Nomland*, 3 N. D. 427, 57 N. W. Rep. 85), that it should not be so construed as to unduly clog or restrict legislation. But in the case cited the following language was also used: "But we have no duty higher or more sacred than is the duty to preserve in all its integrity every provision of the fundamental law of the state. The provisions of our state constitution are, by the terms of the instrument itself, declared to be mandatory,—mandatory alike upon the legislature and upon this Court. If the legislature, in any act, disregard the mandate, it is the duty of this Court to nullify the act, and the fact that the abortive legislation may be highly beneficial and salutary in its nature can in no manner control the duty." In addition to the numerous authorities cited in *State* v. *Nomland*, we cite the following as cases illustrative of the proper construction to be given to the constitutional provision we are considering: *Ives* v. *Norris*, 13 Neb. 252, 13 N. W. Rep. 276. In the case at bar the body of the act is broader than its title, and hence it must be annulled in so far as it transcends the title and is inconsistent therewith. 23 Am. & Eng. Enc. Law, p. 232, § 23, note 6; *People* v. *Congdon*, 77 Mich. 351, 43 N. W. Rep. 986. In the case we are considering the several causes of action are based upon payments of taxes upon land exempt from taxation, made prior to the passage of the act of 1897, under which the action is brought. We are therefore not called upon to determine, and do not determine, whether the act in question is equally open to objection on constitutional grounds when applied to causes of action arising upon a different state of facts.

The judgment of the trial court will be affirmed. All the judges concurring.

(76 N. W. Rep. 993.)

REBECCA G. COLEMAN *vs.* THE CITY OF FARGO.

Opinion filed October 11th, 1898.

Cities—Organization and Government.

The provisions of article 7 of chapter 28 of the Political Code, embraced within sections 2171-2174 of the Revised Codes, and relating to the organization and government of cities, considered and construed.

Personal Injuries—Presentation of Claims.

The plaintiff, more than 60 days prior to commencing this action, made out and verified in proper form a claim for damages against the defendant for personal injuries resulting from a fall upon a sidewalk maintained by the defendant. Said claim was filed in due time in the office of the city auditor, and subsequently, and within 60 days from the date of the alleged injury, the auditor presented said claim to the mayor and council by reading the same to them at a regular session, the mayor being then present, and presiding at said session. The claim was never audited and allowed. Upon this state of facts appearing at the trial, the plaintiff was permitted, against objection, to put said claim in evidence. *Held*, that the ruling was not error, and that such presentation of the claim was sufficient as a preliminary to instituting suit on the claim.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Rebecca G. Coleman against the City of Fargo to recover for personal injuries. From a judgment for plaintiff, and an order denying its motion for a new trial, defendant appeals.

Affirmed.

Charles J. Mahnken and *John E. Greene*, for appellant.

The plaintiff as a condition precedent to action against the city should have presented his claim to the Board of Audit. § § 2170, 2171, 2172, Rev. Codes. The law not providing a method of service upon the board of audit the service must be personal. Potwine Appeal, 31 Conn. 381; Wade on Notice, 1312, 1313, 1334 and 1335; *McDermott* v. *Board*, 25 Barb. 646; *Rathburn* v. *Acker*, 18 Barb. 393; *Nichols* v. *Boston*, 98 Mass. 39; *City* v. *Saulcey*, 38 Pac. Rep. 1098; *Burford* v. *Mayor*, 49 N. Y. Supp. 969. The statute is mandatory and must be strictly construed. Suth. Stat. Cons. § 454; *Underhill* v. *Town*, 46 Vt. 767; *Nichols* v. *Minneapolis*, 30 Minn. 547. The fact that the claim was in fact considered in a session of the council, does not operate as a waiver of service. The officers cannot waive the mandate of a statute which effects the rights of the public. *Underhill* v. *Washington*, 40 Vt. 767; *Veazie* v. *Rockland*, 68 Me. 513; *Gay* v. *Cambridge*, 128 Mass. 387; *Starling* v. *Bedford*, 62 N. W. Rep. 674; *Borst* v. *Sharon*, 48 N. Y. Supp. 996.

Leonard A. Rose and *Fred B. Morrill* (*Edward Engerud* of counsel), for respondent.

WALLIN, J. This is an action to recover damages for a personal

injury resulting from the alleged negligence of the defendant in maintaining a sidewalk. The plaintiff recovered below, and the defendant now asks for a reversal of the judgment in this Court upon the ground that incompetent evidence was allowed to go to the jury. A single error is assigned in this Court, and the question presented thereby involves the construction to be placed upon article 7 of chapter 28 of the Political Code. Sections 2171, 7172, Rev. Codes, are as follows: "The mayor and common council of all cities organized under the provisions of this chapter are constituted boards of audit for said cities respectively." "All claims against cities for damages or injury alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any street, crosswalk, sidewalk, culvert or bridge of any city, or from the negligence of the city authorities in respect to any such street, crosswalk, sidewalk, culvert or bridge, shall, within sixty days after the happening of such injury or damage, be presented to the mayor and common council of such city by a writing signed by the claimant and properly verified, describing the time, place, cause and extent of the damage or injury." The remaining sections of article 7 provide, in effect, that no action can be maintained on this class of claims against cities unless it is made to appear that the same have first been presented to the mayor and council in proper form, within the time limited, and that the mayor and council have not allowed and audited the same within the period stated in the statute. On August 31, 1896, the city council being then assembled in regular session, the mayor being present and presiding at the session, the city auditor produced the claim, and presented the same to the mayor and council by reading the same to them during said session. The claim was then turned over to the city attorney, after the council, by a vote, had referred the matter to the street committee of that body. The paper containing the claim was never out of the possession of the auditor until it was delivered to the city attorney. It is conceded that the claim was presented within the time limited by the statute for the presentation of such claims, and was not at any time audited and allowed; and it is also conceded that the claim was in proper form, and was sufficiently verified when read to the mayor and council by the auditor.

Upon these facts the appellant's counsel in their brief state their contention as follows: "We contend that the record in this case does not disclose that any claim has ever been presented to be considered by the board of audit of the City of Fargo in this case. Until such presentation has been made, such board of audit has no jurisdiction to pass upon the merits of the claim; and, until such jurisdiction has been conferred, no action or want of action on the part of the board of audit can warrant the prosecution of an action upon the claim in any court." In explanation of what is meant by counsel by the statement in their brief that "the record does not disclose that any claim has ever been presented to be considered by the board

of audit," it is contended by the counsel that "the record in this case does not disclose that the plaintiff, or any person employed by her, ever presented any claim for the damages sued for. There is nothing to show that the city auditor or his employe * * * was requested by the plaintiff, her agent or attorney, to present the same to the mayor and council or to the board of audit." The gist of this contention seems to be that, while the plaintiff's claim was, at the proper time, presented to the proper official body, viz: the mayor and council, by the city auditor, in whose office it was filed, and with whose employe it had been left, nevertheless, it was not so presented lawfully, and hence could not have been lawfully considered by the board of audit, because it does not appear affirmatively from the evidence that the auditor acted upon the request of the plaintiff in presenting the claim to the mayor and council. We cannot uphold this contention. The statute governing the presentation of this class of claims has not attempted to prescribe the manner of their presentation, nor to indicate the persons who shall present them, or the particular channel through which the claims are to be presented. Sections 2172-2174, supra. In the absence of statutory regulation, the claimant is wholly unrestricted with respect to the manner of presenting his claim, and may choose any manner which suits his convenience, provided, always, that his claim is presented in proper form, and within the statutory time, to the proper body.

Counsel further argue that, inasmuch as the presentation of this class of claims is a necessary preliminary to the institution of an action to collect the same, the presentation is therefore assimilated to a process summons or notice, which must be served personally, or in some manner pointed out by the statute. We think this point is too far-fetched. The language of the charter is simply that this class of claims shall "be presented to the mayor and council." The statute, as has been seen, leaves the manner of such presentation wholly optional with the claimant.

Counsel further argue that, when the mayor and council sit as a board of audit upon this class of claims, they are a distinct and independent body, in which the mayor is an active member, having a vote, and over which he is not necessarily the presiding officer. We deem this point wholly immaterial to a decision of this case. The mode of organizing this independent body, if it is such, is not prescribed in the statute, nor are the times and places of its sessions prescribed, nor is the mode of calling it together laid down in the law. Nor does the statute, in terms or by implication, accord any hearing to the claimant before any independently organized body upon the merits of his claim. As has been seen, the claimant is required by statute, after putting his claim upon paper, and verifying it, to present the same to the "mayor and council," without specifying whether such presentation shall be made at a session of either one body or the other,—if, indeed, the law ever contemplated the existence of two distinct and independent bodies in this connection. Without enlarging further upon the case, it will suffice

to say that we think the record shows a sufficient presentation of this claim to the mayor and council as preliminary to the commencement of the action, and that the trial court did not err in permitting the claim to go to the jury against the objection of counsel. The assignment of error must be overruled, and the order denying a new trial and the judgment entered below will be affirmed. The other judges concurring.

(76 N. W. Rep. 1051.)

GEORGE EDMONSON *vs.* THOMAS WHITE, *et al.*

Opinion filed October 13th, 1898.

Certificate of Appeal Under Newman Law.

Construing section 5630, Rev. Codes, this court is without authority to review the evidence, for the purpose of deciding whether the findings of fact are justified by the evidence, in a case where the certificate of the Court below fails to show that all of the evidence offered at the trial is certified to this court.

Improper Certificate to Stated Case.

In this case the certificate of the trial court stated that the statement of the case contained all the evidence "considered and proceedings had." *Held,* that, under such certificate, the evidence cannot be reviewed.

Findings of Fact Not Considered.

Held, further, for the same reason, that findings of fact proposed and refused below cannot be inquired into.

Conclusion of Law Justified by Findings.

Also *held,* that the conclusions of law herein are justified by the findings of fact.

Appeal from District Court, Bottineau County; *Morgan,* J.

Action by George Edmonson and Kate Edmonson against Thomas White, as sheriff of Bottineau County, and the First National Bank of Grand Forks, to enjoin an execution sale. From a judgment for plaintiff, defendants appeal.

Affirmed.

McDermont & Mayer, for appellants.

V. B. Noble and *E. A. Maglone,* for respondents.

WALLIN, J. This action was brought to enjoin the sale of a certain tract of land claimed by the plaintiffs as their homestead, and which it is conceded is the land of the plaintiff George Edmonson. The defendant White, as sheriff, to satisfy a judgment against said George Edmonson in favor of said First National Bank, levied upon the land, and advertised to sell the same to satisfy said judgment.

Issue being joined, the case was tried to the Court, and findings of fact and law were made and filed; whereupon judgment was entered in favor of the plaintiffs, granting the relief prayed for in the complaint.

Defendants challenge a number of the most important findings of fact filed by the trial court, and have incorporated in the record specifications stating wherein, as defendants claim, such findings are not justified by the evidence. Defendants have further excepted to certain conclusions of law filed by the Court upon the facts as found by the Court. The record further discloses that the defendants except to the refusal of the trial court to make and file certain findings of fact as proposed by the defendants. The action was tried by the Court in June, 1896, and hence is governed by section 5630 of the Revised Codes, which took effect January 1, 1896. That section requires: First, that "all the evidence offered at the trial shall be received;" second, that, where it is sought to have the evidence reviewed, a statement of the case may be settled in the manner pointed out in said section; third, "which statement shall contain in a narrative form without unnecessary repetition all the evidence offered at the trial." The last provision of the section is as follows: "The Supreme Court shall try the case anew and render final judgment therein according to the justice of the case." In reviewing the evidence, this Court tries the case anew, but, inasmuch as our jurisdiction in this class of cases is purely appellate, the trial in this Court can be had anew only upon such evidence as may be found in the record sent up. We cannot take new testimony here for the purpose of trying the case anew, under this statute. See *Christianson* v. *Association*, 5 N. D. 438, 67 N. W. Rep. 300. Under this section of the Code, an appellant who seeks to have the testimony reviewed in this Court is required, not only to embody in the record the testimony and reduce it to a narrative form, but it is further especially required that the statement of the case shall contain "all the evidence offered at the trial." The obvious purpose of this section, as well as that which it amends, is to place before this Court all the evidence offered below, and then to require this Court to try the case upon such evidence and the whole thereof. The fact that an item of evidence offered below was incompetent or inadmissible for any reason, and hence was not considered in the trial court, cannot operate to exclude such item from the statement. The plain language of section 5630 precludes such a construction of the law.

These preliminary observations lead up to a point which, in our judgment, must dispose of the case. In this Court the respondents call our attention to the certificate of the trial court, and take the position that, on account of defects in such certificate, this Court is without authority to try the case anew, under the evidence in the record. The judge's certificate appended to the record, excluding its immaterial recitals, is as follows: "I do hereby certify that the foregoing is a full and true statement of the case, and contains

all the evidence considered and proceedings had therein, and it is hereby ordered that the agreed statement, as hereunto annexed, be, and the same is hereby, allowed and settled as a full and correct statement of the case." There is a recital in the record, preceding that part thereof which is headed "Bill of Exceptions," that is explanatory of the language contained in the judge's certificate above set out. This recital is to the effect that all the evidence in the case was reduced to writing, and then proceeds as follows: "And so far as necessary (said testimony and deposition being all the testimony on the trial herein) is referred to, and upon said testimony a bill of exceptions was settled as follows." Then follows what is called the "bill of exceptions," to which the certificate is appended. This recital shows on its face that the entire mass of the evidence was accessible, and that the same was referred to and was the basis upon which the bill was settled, but it also appears that the testimony was referred to in settling this bill only "so far as necessary." This language implies that the testimony in the case was sifted, and was used only so far as the Court and counsel may have deemed the same necessary or pertinent or competent upon the issues joined. Practically the same idea is contained in the judge's certificate, wherein it is stated that the statement contains "all the evidence considered." These words likewise imply that the record embodies the evidence actually considered by the trial court, but fails to state the essential fact that all the evidence offered at the trial is certified to this Court. Upon this record we cannot review the findings of fact to ascertain whether those challenged are sustained by the evidence, and are therefore compelled to sustain the contention of the respondents' counsel upon this point.

Appellants' third point, viz: that the Court below erred in refusing to make and file certain findings of fact proposed as findings by the defendants, must likewise fall, for the reasons already advanced. It is obvious that the question attempted to be raised upon this feature of the case cannot be decided without a reference being had to the evidence, and that, as has been seen, is not before us for review or consideration. Nor do we desire to be understood as ruling that a question touching the findings can, under this statute, be raised by merely proposing certain findings, and excepting to the ruling if the court below fails to make the requested findings. Upon this mooted point we express no opinion.

The appellants contend, finally, that the conclusions of law are not justified by the facts found by the trial court. The pivotal issue in the case is whether the land involved was the homestead of the plaintiffs. Upon this point the Court expressly finds as a fact that it was originally plaintiffs' dwelling place and homestead, and further finds that while the plaintiffs had removed from, and were not living on, the land when the levy was made, and when the suit was brought, and that they were living elsewhere, nevertheless that such removal was for a temporary purpose only, and that while absent from the land the plaintiffs at all times fully intended to return to,

and reside on, the land as their homestead. These facts, which cannot be reviewed upon this record, manifestly justified the trial Court in concluding that the land is not subject to seizure and sale on final process. True, the Court did not find affirmatively that any dwelling house was upon the land which was fit for human habitation at the time of the trial, or during the period of the plaintiffs' absence from the land. Counsel contend that this omission is fatal. We cannot concede that it is, necessarily. A tract of land does not necessarily cease to be a homestead, within the meaning of the law, simply because at a particular time there is no house upon it fit to live in. The absence of a house might be explained, and, despite such absence, it might be made to appear to the satisfaction of a court that the land was a homestead, and that its owners fully intended to rebuild, and dwell upon the land as such. The judgment enjoining a sale of the land must be affirmed. The other judges concur.

(76 N. W. Rep. 986.)

MARY KRUMP *vs.* FIRST STATE BANK OF HANKINSON.

Opinion filed October 14th, 1898.

Money Obtained by Fraud—Action to Recover.

An action may be maintained to recover back money obtained by fraud and under circumstances which, in equity and conscience, require that it should be repaid.

Evidence.

Evidence examined. *Held,* that the facts do not entitle the plaintiff to recover.

What Constitutes Payment.

Where K. and H. ship and sell a car of grain to one B., in which each has a half interest, B.'s check, sent to H. and payable to him, in payment therefor, it going to protest, does not affect the debt B. owes to K. and H.

Appeal from District Court, Richland County; *Fisk,* J.

Action by Mary Krump against the First State Bank of Hankinson to recover money alleged to have been paid under duress and through fraud. Judgment for defendant on a directed verdict. From the judgment and order overruling a motion for a new trial, plaintiff appeals.

Affirmed.

Freerks & Freerks, for appellant.

W. E. Purcell and *Chas. E. Wolfe,* for respondent.

YOUNG, J. This is an action to recover from the defendant the sum of $206, alleged to have been obtained by it from the plaintiff by fraud, consisting of false representations, threats, and menaces.

Upon the trial of the case, at the close of plaintiff's evidence, defendant, upon its motion, obtained a directed verdict. Plaintiff moved for a new trial, upon a settled statement of case, which was denied, and judgment entered for defendant. Plaintiff, upon this appeal, assigns errors, which, for convenience of reference, we divide into two classes,—the first relating to the rulings of the trial Court upon the admission and rejection of evidence; the second to the orders directing a verdict, the overruling of the motion for a new trial, and the order for judgment for defendant.

With the first class we have no difficulty, and need only say that a careful examination of the rulings complained of satisfies us that the appellant's assignments of error in that particular are not well founded. Her further assignments, however, require more extended consideration. While they are separately directed to the court's action in nonsuiting plaintiff at the close of her case, overruling the motion for a new trial, and ordering judgment, yet they are all resolved by a right answer to this question: Was the Court correct in directing a verdict for the defendant?

It appears that in 1896 the plaintiff had rented her farm near Hankinson to one Hilkie, upon shares, each receiving one-half of the grain grown upon it. As the grain was threshed in the fall, it was shipped without division, and the returns, when received, were divided equally between them, Hilkie attending to the shipments, and bringing to the plaintiff her share of the money as received from each individual shipment. About October 10, 1896, one car of this grain was shipped to Andrew H. Burke, at Duluth, who sent to Hilkie, in payment therefor, his check for $412 drawn upon the Marine National Bank of Duluth. This check, which was payable to Hilkie, was indorsed by him, and cashed at the First State Bank of Hankinson, the defendant herein. The check was worthless, and came back protested for nonpayment. Prior to the protest, however, Hilkie paid over to Mrs. Krump, the plaintiff, $206, being one-half of the money received from the defendant bank upon Burke's check. At the time Hilkie gave her this money, he exacted from her a promise that she would repay it in case the Burke check returned unpaid. Shortly after the check came back protested, Mr. Kinney, cashier of the defendant bank, called upon indorser, Hilkie; and together they went to plaintiff's residence, and she then paid to Mr. Kinney, for the bank, the $206 she had received from Hilkie for her share of the car of wheat shipped to Burke, the bank remitting one-half of the protest fee. At her request, it was then arranged that the bank should hold the protested check, and try and collect it from Burke, and, when collected, the proceeds were to be divided equally between plaintiff and Hilkie. Plaintiff alleged that she was induced to part with this money through the fraudulent acts, menaces, and threats of Kinney. After a careful consideration of the evidence and all the circumstances, and in the light of the legal obligations of the parties, we are of the opinion that these contentions are not supported.

Has the defendant $206 of the plaintiff's money which, "in equity and good conscience, it ought to repay?" That is the test. *Brand* v. *Williams,* 29 Minn. 238, 13 N. W. Rep. 42; *Bayne* v. *U. S.,* 93 U. S. 642; *Ela* v. *Express Co.,* 29 Wis. 611; *Byxbie* v. *Wood,* 24 N. Y. 607. We think not. Hilkie was liable to the defendant bank for the entire $412 received from it, one-half of which he had given to the plaintiff, and which she then had. Mrs. Krump was not only morally, but also legally, bound to repay Hilkie. In his presence, and with his presumed assent, she paid to Kinney, for the bank, the $206 she had received from Hilkie, thus discharging her liability to him by paying one-half of his liability to the bank. Had this adjustment not been made, the bank would have had its action against Hilkie for the $412, and Hilkie against the plaintiff for the $206 he had paid her, leaving this plaintiff at the end of two suits just where she is now.

Appellant contends that, if not permitted to recover from the bank she is the victim of a wrong without a remedy, inasmuch as the check was made payable to Hilkie, and she is in no way a party to it. This is not a correct conclusion. She and Hilkie were equal owners of the car of grain shipped to Burke. His worthless check did not constitute payment of the debt. They still retain their demand against the original debtor. The order of the lower court in directing a verdict is approved. Judgment affirmed. All concur. (76 N. W. Rep. 995.)

TOWNSHIP OF NOBLE *vs.* OLE T. AASEN.

Opinion filed October 15th, 1898.

Appeal—Review—Striking Out Counter-Claim—Waiver.

To plaintiff's complaint defendant answered in denial and by counterclaim. To such counterclaim plaintiff replied. Subsequently, and at the trial, and on plaintiff's motion, the counterclaim was stricken from the files on the ground that it did not state facts sufficient to constitute a counterclaim against plaintiff. Plaintiff did not withdraw, or offer to withdraw, its reply. The case upon the remaining issues was tried under section 5630, Rev. Codes, as amended by chapter 5, Laws of 1897. Defendant offered no evidence under his counterclaim. *Held,* (1) That the action of the court in striking out the counterclaim could be reviewed by this court upon an appeal from the final judgment, even though such ruling might have been the subject of an independent appeal. (2) In order to obtain a review of such ruling, it was not incumbent upon defendant to offer testimony in support of his counterclaim. In actions tried under said section 5630 it is only in cases where issues of fact are joined that a party is required to offer and preserve the testimony. Such testimony is not necessary to enable this court to retry the issues of law involved. (3) That by replying plaintiff had waived the point that the facts stated did not constitute a counterclaim that could be pleaded in this case, and could only insist that they did not constitute a cause of action in favor of defendant that could be enforced against plaintiff under any circumstances.

Eminent Domain—Compensation.

The constitution and laws of this state fix upon a civil township that takes or damages private property for public use a liability to render just compensation therefor to the owner.

Liability of Township.

When township officers, acting colore officii, perform an act which is entirely within the scope and power of the township to perform, but perform the same in an improper and unlawful manner, such act is, nevertheless, the act of the township.

Appeal from District Court, Cass County; *Pollock*, J.

Action in equity by the Township of Noble against Ole T. Aasen for an injunction and damages. From a judgment for plaintiff, defendant appeals.

Reversed, with directions.

H. Steenerson and *Hildreth & Ingwaldson*, for appellant.

Morrill & Engerud, for respondent.

BARTHOLOMEW, C. J. The record in this case is in an anomalous condition. The plaintiff township brought an action in equity asking a decree permanently enjoining defendant from interfering in any manner with a certain culvert in a certain highway in said township, and also asking damages for a previous destruction of such culvert. The defendant answered both by general denial and by new matter pleaded as a counter claim. To this counterclaim plaintiff replied by general denial. The case being thus at issue was brought on for trial. At the opening of the trial, plaintiff's attorney moved to strike out the counterclaim for the reason "that the facts set forth in the alleged counterclaim are not sufficient to constitute any counterclaim against the township." This motion was granted, and an exception saved. The trial then proceeded upon the remaining issue, and resulted in a decree as prayed for, with damages. From the final judgment the defendant brings this appeal. The only error assigned is the ruling on the motion to strike. The abstract contains only the pleadings, the motion, the ruling thereon and exceptions, the final judgment, and notice of appeal. In the notice of appeal no mention is made of the order striking out the counterclaim.

It is urged that the order cannot be reviewed on an appeal from the final judgment. We reach the opposite conclusion. We need not decide in this case whether or not such order was an appealable order, under section 5626, Rev. Codes. It was an intermediate order, which involved the merits, and necessarily affected the judgment; and as such it is reviewable on appeal from the final judgment, under section 5627. The fact that it might have been the subject of an independent appeal before final judgment does not prevent its review upon appeal from the judgment. Our appeal law is substantially like that of Wisconsin. And see *Machine Co.* v. *Gurnee*, 38 Wis. 533; *Machine Co.* v. *Heller*, 41 Wis. 658; *Morris* v. *Niles*, 67 Wis. 341, 30 N. W. Rep. 353; also, *Granger* v. *Roll* (S. D.) 62

N. W. Rep. 970; *Buchanan* v. *Insurance Co.* 96 Ind. 510. But, as this case was tried under section 5630, Rev. Codes, as amended by chapter 5, Laws 1897, respondent contends that the error assigned cannot be reviewed, under the ruling of this Court in *Nichols & Shepard Co.* v. *Strangler*, 7 N. D. 102, 72 N. W. Rep. 1089, for the reason that no evidence is preserved in the record, and none was offered under the counterclaim, and, as announced in that case, this Court, in cases tried under said section, sits for trial de novo, and not for the correction of errors. But the question here presented is radically different from that presented in the case cited. True it is that in cases tried under said section this Court tries the issue de novo, whether it be an issue of law or an issue of fact. Evidently, an issue of fact, cannot be retired by this Court, in the absence of all the testimony offered upon that issue. But the wording of the statute declares: "In all actions tried by the District Court without a jury, in which an issue of fact has been joined, all the evidence offered on the trial shall be received." It is only when an issue of fact has been joined that the introduction of testimony is contemplated. If a complaint equitable in its nature, and tendering an issue of fact that must be tried by the Court, if tried at all, should be held bad on demurrer, and final judgment dismissing the action rendered against the plaintiff, counsel would scarcely contend that plaintiff could not have such ruling reviewed unless he offered all his testimony to support his allegations of fact, and had it preserved in a stated case, and presented it to this Court. Such a course would be absurd, because there never was an issue of fact in the case, and never was any trial of any issue of fact, and a trial de novo of an issue in this Court can only follow a trial of the same issue in the District Court. Our review in the supposed case would, of necessity, be limited to the issue of law tried by the District Court. The question raised on the counterclaim in the case at bar is, in its legal effect, identical with the supposed case. When, on respondent's motion, the Court struck the counterclaim from the case, it was out for all purposes of the trial of any issue of fact. No evidence could be offered under it, because it no longer existed as a pleading in the case. The trial of the issue of law had eliminated it. But the circumstance that there is no evidence here to support the issue of fact that it tendered when in the case in no manner prevents a retrial in this Court of the issue of law that the District Court did try and determine. Should our determination of that issue be different from that of the District Court, then it would be our duty to remand the case for a trial of the fact issues tendered by the counterclaim, and which never have been tried.

We come now to the consideration of the ruling upon the motion. The motion to strike was ill-timed, and ought not to have been considered. Respondent had already served a reply. He was in the position of attacking a pleading as to which he had already pleaded to the facts. The case presents no reason why the technical rules of pleading should not be enforced. The basis of the motion, as

stated by counsel, was "that the facts set forth in the alleged counterclaim are not sufficient to constitute a counterclaim against the township." In so far as the motion raised the question that the facts stated did not constitute a cause of action in favor of appellant and against respondent that could be enforced under any circumstances, it was proper enough. That point is not foreclosed by pleading to the facts, and the exact manner in which it is raised may not be material. But, in so far as it attempted to raise the point that the facts did not constitue a counterclaim that could be enforced against the township in this particular case, it was abortive, for the reason that such point was waived by pleading to the facts, and no leave was given or asked to withdraw the reply. See *Bank* v. *Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473, and cases cited on page 401, 4 N. D., and page 478, 61 N. W. Rep.

The investigation of one further inquiry will decide this case: Do the facts set forth in the counterclaim constitute a cause of action in favor of appellant and against respondent? The allegations are that during the year 1893 the respondent, for the purpose of draining a certain highway,—being the same highway whereon the culvert hereinbefore mentioned had been constructed,—wrongfully and unlawfully entered upon appellant's land, which as the pleadings show, adjoined said highway, and constructed various ditches leading from said highway, over and across plaintiff's land; that the ditches along said highway collected the surface water from a large tract of land, and by reason of the connecting ditches constructed upon the appellant's land the water thus collected was thrown upon such land, and the same was overflowed, and greatly damaged for argricultural purposes. Respondent contends that these facts constitute no liability against it, because townships act only through their officers, and are not liable for the unlawful or negligent acts of such officers. In *Vail* v. *Town of Amenia*, 4 N. D. 239, 59 N. W. Rep. 1092, we held that a township was not liable for a personal injury received by reason of the negligence of a township officer in failing to keep a bridge in repair. In that case we but followed the great weight of authority in holding that a quasi municipal corporation was not liable in that class of cases, in the absence of an express statute fixing such liability. But the case we are now considering is of a different character. The private property of an individual has been taken and retained for a public use. There must be a liability somewhere. The constitution of this state (section 14) declares: "Private property shall not be taken or damaged for public use without just compensation having been first made to, or paid into court for the owner." This is reiterated in section 5955, Rev. Codes, in treating of eminent domain. The fact that private property has been taken for public use without compliance with this mandate of our organic law, while, in a general sense, it renders such taking unlawful, as pleaded, yet it cannot destroy the right of such party to compensation. Nor can it be doubted that both the constitution and the statute contemplate that such compensation must come

from somebody having power, under the law, to appropriate property for public use. In 1883 the legislature of Dakota territory passed an act providing for township government. The act was chapter 112 of the Session Laws of that year. Its provisions have been continued in force, and now constitute parts of the Revised Codes of 1895. We cite certain provisions as they appear therein, although the cause of action set forth in the counterclaim accrued before such revision was made. Section 2537 declares each township to be a body corporate, with power to sue and be sued. Section 2541 provides for the officers in each township, and includes three township supervisors, and an overseer of highways for each road district. Section 2542, subd. 8, authorizes the electors of the township to vote such sums as they deem proper for the repair and construction of roads and bridges. Section 1114 places all roads and bridges within the township under the exclusive control of the township supervisors, and gives them authority to construct and repair the same, and places the respective overseers of highways subject to their orders in that respect. Section 1151 states the circumstances under which and the manner in which the township may go upon lands of a private party, and take possession thereof for the purpose of draining a highway. The right to do so must be obtained either by contract with such party, or by condemnation proceedings in the name of the township under the statute on eminent domain. These provisions make it clear that it is the duty of the township to construct and maintain in proper repair the highways within its boundaries; and when, to accomplish this, it becomes necessary to construct ditches on private property to drain such highway, it is the duty of the town to do so. As was said in *Vail* v. *Town of Amenia*, the township acts as a governmental agent in the performance of these functions. But government has given it the authority and the purse necessary for their proper performance. We are not deciding when, if ever, a township will be liable for the negligent, wrongful, or unlawful acts of its officers in performing these functions, in the absence of an express declaration of liabilities. But, as we have seen, private property cannot be taken for public use without compensation. In this case private property has been taken for public use, and, if taken by the township, it must pay for the same. But the township says it has never taken such property, because it could only act through its officers, and any act of its officers in taking such property without previous compensation was an unlawful act, and not the act of the township, and not an act for which the township is responsible. In other words, it admits that this property has been taken for its use, and that it has and retains the use and benefit thereof, but contends that it is not liable, because the original taking was unlawful. Practically, this same claim was made in *Schussler* v. *Board*, 67 Minn. 412, 70 N. W. Rep. 6. In that case the commissioners, acting under the authority of an unconstitutional statute, had erected a certain dam, and an action was brought against the county for damages resulting to plaintiff by rea-

son of the construction of the dam. In the opinion we find this language: "It (the defendant) comes into court, and by its pleadings and evidence attempts to uphold the wrong it has done by its officials, and persists in the continuance of this wrong, but, by contention of counsel, insists that it is not liable in damages, because its acts were unconstitutional, unauthorized, and void. Not only this, but it insists upon retaining the benefits of the illegal acts of its officers. * * * If valuable property rights can be thus taken, destroyed, diverted, and injured without compensation, there will be but little safety in the private ownership of property." The defendant was held liable. That authority would defeat respondent in this case, even should we admit his premises. Of course, it is conceded that where, colore officii, a township offier performs an act which the town is without authority to perform in any manner or under any circumstances, and there is no resultant benefit to the township, which it appropriates and retains, there could be no liability on the part of the township. But in this case that which was done was not in itself unauthorized or unlawful. It was only the manner of doing it that was unlawful. The township had a right to do just what was done, provided it proceeded as the statute directs. But where a township officer, under color of office, performs an act which the township has full power to perform, but performs it in an improper manner, we deem it well settled that such act is, in legal effect, the act of the township. 2 Dill. Mun. Corp. § 971, and cases there cited. Also *Woodruff* v. *Town of Glendale*, 23 Minn. 537; *Peters* v. *Town of Fergus Falls*, 35 Minn. 549, 29 N. W. Rep. 586; *Dodge* v. *Ashland Co.*, 88 Wis. 577, 60 N. W. 830. We are clearly of the opinion that the counterclaim set forth a cause of action in favor of appellant and against respondent, and it was error, under the circumstances of this case, to strike it out. The District Court of Cass County is directed to set aside the order striking out the counterclaim, and proceed to the trial of the issues of fact raised by the counterclaim and the reply thereto.

Reversed. All concur.

(76 N. W. Rep. 990.)

FARMERS' AND MERCHANTS' NATIONAL BANK *vs.* CHESTER H. DAVIS.

Opinion filed October 20th, 1898.

Appeal—Stated Case—Certificate—Newman Law.

Construing section 5630, Rev. Codes, as amended by the act embraced in chapter 5 of the Session Laws of 1897. In this case the record embraces a statement of the case, which was stipulated by counsel, and which declared in terms that it "contains in itself all the bill of exceptions and a true statement of the evidence in the case, as by section 5467 of the Code of Civil Procedure required." To this stipulation the trial judge appended the following certificate, and no other: "The foregoing statement of the case is settled and allowed this 25th day of August, A. D. 1898." The record further embraced a declaration that the appellant "desires a review of the entire case in the Supreme Court." *Held,* that the certificate of the trial court appended to the record fails to state either in terms, or when construed in connection with the stipulation of counsel to which it refers, that the record sent to this court embraces all the evidence offered at the trial; and hence, under the provisions of said amended act of 1897, the entire case is not in a condition to be tried anew in this court upon the facts, and the judgment must therefore be affirmed.

Act of 1897—Specifications—Abstract on Appeal.

The amended act is further construed, and certain of its features pointed out, as follows: First. That specifications of errors of law, and of particulars wherein the evidence does not justify findings of fact, as prescribed by the earlier statutes and the rules of this court, are no longer required to be placed in a statement in this class of cases. These requirements have been wholly superseded by the act of 1897; the provisions of which relating to specifications are, nevertheless, mandatory, and must be observed by the appellant. The amended act requires that the appellant shall cause to be incorporated with the statement of the case, where he desires only to review one or more particular facts, a specification naming or pointing out such particular facts; and, when the appellant desires a retrial of the whole case in this court, that fact also must be specified or declared in the statement of the case. Second. The act of 1897 omits to re-enact the following provision, found in section 5630 of the Revised Codes: "Which statement shall contain in a narrative form without unnecessary repetition all the evidence offered at the trial." The amended act nowhere requires that the evidence offered at the trial shall be reduced to a narrative form, or otherwise pruned of its superfluous matter, before it can be incorporated in the record to be sent here on appeal. But this enactment does not, of course, annul the rule of court requiring the abstract of the record to be an abridgment of the evidence, and a condensation of the mass found in the record.

Appeal from District Court, Barnes County; *Glaspell,* J.

Action by the Farmers' & Merchants' National Bank of Valley City against Chester H. Davis to quiet title. From a judgment for defendant dismissing the action, plaintiff appeals.

Affirmed.

Herbert Root, for appellant.

Winterer & Winterer, for respondent.

WALLIN, J. This action was brought to quiet title to certain real estate, and was tried below by the Court. The relief prayed for was denied, and a judgment was entered dismissing the action. The plaintiff has appealed from such judgment to this Court, and desires a trial anew of the entire case. The trial and the appeal are governed by section 5630 of the Revised Codes, as amended by the act embraced in chapter 5 of the Session Laws of 1897. A bill of exception or statement was settled by the trial judge, pursuant to a stipulation made by counsel, which is as follows: Stipulation. "It is hereby stipulated and agreed, by and between the respective counsel for the plaintiff and the defendant in the above entitled cause, that the record hereto attached contains in itself all the bill of exceptions, and a true statement of the evidence in the case, as by section 5467 of the Code of Civil Procedure required, and that the exceptions appearing therein were made within due time, and within that allowed by the Court, and that the said foregoing attached statement of the case is hereby to be and become and is hereby attached to the record in said cause, and made a part thereof, to be allowed in the argument of it before the Supreme Court of the State of North Dakota. Dated August 23rd, 1898. Herbert Root, Attorney for Plaintiff. Winterer & Winterer, Attorneys for Defendant." To which stipulation the trial court appended the following certificate: "The foregoing statement of the case is settled and allowed, this 25th day of August, A. D. 1898. S. L. Glaspell, Judge."

It will be observed that the judge's certificate, standing alone, contains no allusion to the evidence offered at the trial, and hence omits to state whether the whole or any part of the evidence offered below is contained in the record transmitted to this Court. We regard this omission as fatal. In sitting as a Court for the retrial of issues of fact, this Court can consider only evidence "offered at the trial." Such evidence, therefore, must be officially certified to this Court by the Court below, and must be embraced within the statement of the case sent here. This Court cannot be required to retry any case under this statute upon a statement of the case which embraces only an abridgment of the evidence as vouched for by agreement of counsel, and which is devoid of any certification of the Court below other than the mere declaration that an agreed statement is "settled and allowed." Upon this point, we cite what was said by this Court in *Thuet* v. *Strong*, 7 N. D. 565, 75 N. W. Rep. 922. Nor does the stipulation so settled and allowed as a statement contain the statement which the law requires. The stipulation does not declare that the evidence offered at the trial is all embraced in the statement; nor that the evidence offered bearing upon any specified facts is contained in the statement. So far as the stipulation refers to the evidence, it states that the record embraces "a true statement of the evidence in the case, as by section 5467 of the Code of Civil Procedure required." Section 5467, supra, declares as follows: "The objection must be stated with so much of the evidence or other matter as is necessary

to explain it, and no more." It therefore appears from the language of the stipulation of counsel, when fairly construed, that all the evidence offered at the trial is not embraced in this record, and that it contains only so much thereof as relates to certain objections. There are no errors specified in the statement of the case, nor is there an attempt made therein to specify wherein the findings of fact made below, or any of them, are not justified by the evidence. These omissions are, however, explained by counsel for the appellant, by stating that, in his judgment, no such specifications are required, under the amendment found in chapter 5 of the Laws of 1897. As will be seen hereafter, we agree with counsel upon this point; but this construction cannot do away with the necessity of an official certificate made by the trial court, to the effect that the evidence offered at the trial is all contained in the record, or that all thereof which relates to certain specified questions of fact is contained in the record. See chapter 5, Laws 1897.

In this case, counsel for appellant has, in lieu of the specifications required by section 5467 of the Revised Codes, appended to the stipulated case a declaration signed by him, to the effect that appellant "desires a review of the entire case in the Supreme Court;" also, that he desires to review certain of the findings of fact made by the District Court which he refers to by their numbers only; and, further, that he desires this Court "to make such findings of fact as would establish all the material allegations of the complaint," these last not being otherwise described or specified. This declaration of counsel clearly states that the appellant desires a retrial in this court of the entire case. As has been seen, this cannot be accorded to the appellant, for the reason that it does not appear that all of the evidence is certified to this Court, and it does appear affirmtively that only a version of the evidence offered at the trial is embraced in the statement of the case. This omission in the record precludes a trial of the entire case de novo in this Court, and renders an affirmance of the judgment necessary, and such will be the disposition made of the case; but, inasmuch as this is the first case coming before this Court in which we have been directly called upon to construe the amended act found in chapter 5 of the Session Laws of 1897, we deem it proper to call attention to the more important changes in the practice regulating appeals in this class of cases which have been introduced by the amendment of 1897.

We note, first, that certain requirements are found in the amended act not found either in the original act of 1893, or in the amendment thereto embraced in section 5630 of the Revised Codes. We refer, first, to the provision requiring the appellant, in framing his statement of the case, to "specify therein the question of fact that he desires the Supreme Court to review." This requirement is mandatory in its terms, and, in our opinion, its entire omission from the statement would preclude a retrial in this Court of any fact within the issues. The statute further declares as follows: "The Supreme Court shall try anew the questions of fact specified in the statement

or in the entire case." The provisions in the amendatory act make it incumbent on the appellant in this class of cases to incorporate with the statement of the case certain specifications; and, as we construe the act, it requires, in cases where the appellant desires to have reviewed only certain particular facts, that such facts must be pointed out or specified in the statement; and, where the appellant desires to retry the entire case in this Court, it is incumbent upon him to specify or state that fact in the settled statement of the case. But we are likewise of the opinion that the act of 1897 has entirely superseded the requirements of section 5630 and of article 8 of chapter 10 of the Revised Codes, relating to the specification of errors of law, and of the particulars wherein findings of fact are not justified by the evidence. Under the amendment we are considering such specifications as are required by former statutes and by the rules of this Court are no longer required in actions tried below without a jury, and which come to this Court for a retrial upon the merits. To construe the amended act to mean that it requires a new kind of specifications of fact, differing in form from any specifications required by pre-existing statutes, rules of court or practice, and that the new variety of specifications called into being by this statute must be inserted in the record in addition to those specifications required by the older statutes and pre-existing practice, would be to invite a swarm of intolerable perplexities, and to place such obstacles in the way of an appellant as would prove, in our opinion, well-nigh insurmountable, and in many cases practically insurmountable to the average practitioner. Such a construction would violate an established rule requiring a liberal construction of the statutes and rules of procedure in furtherance of justice. The amendment declares that the appellant shall cause a statement of the case to be settled "within the time and in the manner prescribed by article 8 of chapter 10 of this Code." The amended act, we think, significantly omits the word "prepared," found in section 5630 of the Revised Codes. So that the statement framed under the amended statute is not in terms required to be prepared under the provisions of article 8 of chapter 10, supra. It is only provided by the last enactment that it shall be "settled within the time and in the manner" prescribed in article 8 of chapter 10. We think this language should be held to mean that a statement should be settled within the time and in the manner as originally prescribed in the older statutes, but that its preparation with respect to its structure and component parts must be as prescribed in chapter 5 of the Laws of 1897, and this to the exclusion of the specifications which were held to be essential under the statutes and rules of court, which are to this extent not adopted by the terms of the act of 1897. In *Thuet* v. *Strong*, 7 N. D. 565, 75 N. W. Rep. 922, the Court inadvertently used some language that is, perhaps, too broad. It in no manner affected the decision of that case, but our language conveys the impression that the statement must be prepared as directed in said article 8. That was true before section 5630 was

amended in 1897, but under the amendment, as we have seen, it is only to be settled under those provisions. Of course, the pre-existing statutes are not repealed by the act of 1897; but the same are not in Court cases adopted by the act of 1897, except as hereinbefore explained. In other words, where the amendment is necessarily inconsistent with a preceding statute or rule of court, the amendment will prevail. Again, we cannot overlook the fact that the amendment of 1897 wholly omits to re-enact the following provision, found in section 5630 of the Revised Codes: "Which statement shall contain in a narrative form without unnecessary repetition all the evidence offered at the trial" The latest enactment nowhere requires in terms or by implication that the evidence at the trial shall be reduced to a narrative form in the statement of the case, or that it shall be otherwise pruned of superfluities before it can be incorporated in the record. In the entire absence of any such requirement, we think this Court would not be justified in reading into the act any such provision; but this, of course, does not operate to annul an existing rule of court which requires that the record shall be abridged in the abstract thereof which is presented to this Court. Nor does the statute abrogate the rule of court requiring points to be assigned in the brief of the appellant's counsel.

Perhaps it may be true that all we have said in the way of construing the act of 1897 is not strictly necessary to a decision of this case. We have enlarged somewhat in this opinion in the hope that we might facilitate appeals taken under this act, and render unnecessary the dismissal of cases from the consideration of this Court without a decision upon their merits,—a duty which is never an agreeable one to this Court. All the evidence offered below not being certified to this Court, a retrial here of the entire case cannot be had anew upon the evidence and facts, and hence the judgment entered below will be affirmed. All the judges concurring.

(76 N. W. Rep. 998.)

DANIEL PATTERSON *vs.* G. A. WARD, *et. al.*

Opinion filed October 21st, 1898.

Receivers—Offsetting Judgments.

Where the district court has, by final order, allowed the account of a receiver, and directed therein the payment of a specific sum to one who has rendered services connected with the receivership, this order does not constitute such a judgment as is contemplated by section 5499, Rev. Codes, relating to offsetting judgments.

Claims Against Insolvent—Mutual Judgments.

Where A. has a judgment against B., who also has an account against C., who is receiver in the litigation wherein A. is plaintiff and B. defendant, and in which the judgment is rendered, B.'s claim, upon the receiver's final account having been allowed by the court,

and ordered paid from funds then on hand, *held*, that there is lacking the mutuality necessary for offsetting as required by the Code section above cited, the parties not being the same.

Order Directing Receiver to Pay Claim.

Held, further, that such order creates in the claimant a demand against the receiver, freed from equities in favor of his judgment creditor, and ends the jurisdiction of the court over the same further than to require the payment of the sum allowed to the party or parties to whom it is due.

Appeal from District Court, Traill County; *Pollock*, J.

Action by Daniel Patterson against G. A. Ward and others for the appointment of a receiver and to foreclose a mortgage. After judgment, plaintiff moved for an order against H. D. Hurley, receiver, to pay over certain money. J. E. Paulson and others interpleaded, and from an order granting the motion they appeal.

Reversed.

J. F. Selby and *Carmody & Leslie*, for appellants.

F. B. Lambert, for respondent.

YOUNG, J. This is an appeal from what is denominated in the record an "order offsetting judgments." No question of practice is raised. In 1894 one H. D. Hurley was appointed as receiver, by the District Court of Traill County, in an action entitled "Daniel Patterson vs. G. A. Ward, et al." Under the terms of his appointment it was his duty to crop the lands involved in that litigation for that year, and in carrying out such purposes he employed G. A. Ward, he being one of the defendants in that action, to harvest, shock, and care for the grain. In November of that year after the business of the farming year was concluded, the receiver rendered to the Court his account, which, after a full hearing, at which the parties interested were present in person and by counsel, was, by order of the Court, approved and allowed. In this order the receiver was expressly directed and ordered to pay to G. A. Ward, as a balance due him for his services, the sum of $598.50. Then, after fixing and allowing to Hurley his compensation as receiver, he was directed to retain the balance of the money in his hands, which the account rendered showed was a considerable sum, until the further order of the Court. Patterson, being dissatisfied with the allowances made to the receiver and to Ward, appealed therefrom to this Court. Upon a motion to dismiss the appeal as being taken from an order not appealable, this Court held that it fell "within a class of determinations which are final in respect to the subject matter involved, and hence may be reviewed in this Court as judgments of a special nature, made in an action for equitable relief," and was appealable, the account being full and final, covering all the transactions of the receiver for the full period for which he was appointed. *Patterson* v. *Ward*, 6 N. D. 359, 71 N. W. Rep. 543. On the hearing upon the merits the order of allowance to Ward was upheld by this Court in *Patterson* v. *Ward*, 6 N. D. 609, 72 N. W. Rep. 1013.

In April, 1897, Patterson obtained a judgment and decree of foreclosure against G. A. Ward and three others in the action wherein Hurley was receiver. It appears that after the rendition of the account for the year 1894 Hurley was reappointed, and continued to crop the land as receiver, and, further, that he has not paid to Ward the sum allowed to him in the 1894 account. After obtaining the judgments above referred to, Patterson applied to the District Court for an order requiring the receiver to pay over to him the $598.50 allowed to Ward, to apply upon his judgment against Ward. At the hearing it developed that Ward had given written orders upon the money due him from the receiver at the dates and in the amounts and to the persons as follows: January 16, 1895, $150, to John E. Paulson; November 15, 1894, $164.72 to John E. Paulson; November 13, 1894, $115 to John Schuler; January 16, 1895, $100 to John F. Selby. All of these parties were interpleaded at the hearing, and resisted the offset. On February 10, 1898, Patterson's application was granted, and Receiver Hurley was directed to apply the $598.50 upon the judgment in foreclosure against Ward and others in favor of Patterson. From this order the interpleaders have appealed. This order must be reversed. Respondent did not bring himself within the provisions of Rev. Codes, § 5499, which provides that "mutual final judgments may be set off pro tanto, the one against the other, upon proper application and notice," for the following reasons: "First, the order allowing Ward's account, and directing its payment, while a final determination of its allowance, did not constitute such a judgment as is contemplated by the above statute, and no execution could be issued upon it; second, it was lacking in mutuality, in that it was directed against Hurley, and not against Patterson. It gave Ward no rights against Patterson, but simply required Hurley to pay over money which he then had. Respondent urges, however, that inasmuch as he was obligated, upon Hurley's appointment, to make certain advances to him, necessary for properly conducting the farming operations for the year 1894, and being the plaintiff in the action wherein Hurley was receiver, he is the real party in interest; and he contends thus under the principle cited in *Hobbs* v. *Duff*, 23 Cal. 596, to the effect that, where the parties are not the same, equity, aside from the statute, will look beyond the nominal to the real parties in interest, and allow the offset. The facts do not bring him under the doctrine for which he contends. The order of the lower court allowing the claim of Ward against the receiver, which this Court affirmed, effectually and finally separated it from all equities then or subsequently arising or existing in favor of Patterson in that litigation, and placed it beyond the further control of the Court in that action. No further power remained in the Court relative thereto except, perhaps, to compel obedience to the order by requiring the receiver to pay the sum allowed to Ward to him or to the interpleaders, according to their right. The order directing the offset is reversed. All concur.

(76 N. W. Rep. 1046.)

STATE *ex. rel.* CHAS. W. PLAIN *vs.* FRED FALLEY.

Legislative Nominees—Secretary of State—Duties.

Under the provisions of the statutes of this state, the duties of the secretary of state, in certifying the names of the legislative nominees to the auditors of the proper county, are ministerial, and not judicial.

Refusal to Certify Nominations—Mandamus.

Where such secretary has refused to so certify nominations that were certified to him in regular and proper form, and proceedings are commenced to compel him to certify the names of such nominees, it is no defense on his part to set up facts showing that such nominations were not in fact made in the manner required by the statute.

Application for a writ of mandamus by the State of North Dakota on the relation of Charles W. Plain and others, against Fred Falley, secretary of state, to certify relators' nomination. On the return of the alternative writ, the defendant's motion to quash and set the same aside was denied, and a peremptory writ issued.

Templeton & Rex, for relators.

J. F. Philbrick, Assistant Attorney General, for defendant.

BARTHOLOMEW, C. J. The relators in this case, Charles W. Plain, James Dobie, and J. H. Williamson, ask, at the hands of this Court, a writ of mandamus requiring Fred Falley, secretary of state, to certify their names to the auditor of Cavalier County as nominees of the "Independent and Democrat party" for the offices, respectively, of state senator and representatives for said Cavalier County, the same being the Eighteenth Legislative District of the state. It will be necessary to refer at some length to certain statutory provisions, and also to epitomize the allegations in the alternative writ.

Section 498, Rev. Codes, reads as follows: "Any assembly or convention of delegates held for the purpose of making nominations to public office, or electors to the number hereinafter specified, may nominate candidates for public office to be filled by election within the state. Public printed or posted notice of holding such assembly or convention must be given at least six days before the holding of the same. Such nomination shall be made by delivering to and leaving with the officer charged with directing the printing of the ballots upon which the name is to be placed, within the time *prescribed* herein, a certificate of nomination for each candidate. An assembly or convention within the meaning of this chapter is an organized assembly of delegates representing a political party or principle which cast five per cent. of the total number of votes cast for member of congress at the last general election." The following section declares: "All nominations made by such convention shall be certified as follows: The certificate of nomination, which shall be in writing, shall contain the name of each person nominated, his post-

office address and the office for which he is named and shall designate in not more than five words the party or principle which such convention represents, and it shall be signed and verified by the presiding officer and secretary of such convention, who shall add to their signatures their postoffice address." Section 500 requires the certificates of nomination for state and legislative offices to be filed with the secretary of state, and section 503 provides that such certificate shall be open to public inspection. Section 504 reads: "Not less than twenty-five nor more than thirty days before an election to fill any state or district office the secretary of state shall certify to each county auditor within which any of the electors may by law vote for candidates for such office the name and postoffice address of each person nominated for such office as specified in the certificate of nomination filed with him."

The alternative writ, after reciting at length the facts showing relators to be eligible to the respective offices for which they have been nominated, proceeds to state that heretofore there has been in the state of North Dakota a certain political party known as the "Independent Party," and another political party known as the "Democratic Party;" that the principles of said parties were in many substantial particulars identical, and that it had been the policy of said parties in this state to center their nominations for specific offices, state, legislature, and county, upon the same individuals; that pursuant to said policy, and pursuant to notice duly given by the proper officers of said parties, respectively, said parties duly met in joint convention in the City of Fargo, on July 27, 1898, and placed in nomination a complete state ticket to be voted for at the ensuing general election; that the nominations thus made had been filed with the secretary of state, and by him certified to the various counties of the state. Further, that on September 30, 1898, and pursuant to notices properly given in each instance, the said Democratic and Independent parties of said Cavalier County met in separate delegate conventions at the City of Langdon; that conference committees were appointed, which resulted in a union of the two conventions, and the nomination of a single legislative ticket, under the party designation of "Independent and Democrat Party," and that these relators were the legislative nominees so chosen, and certificates of their nomination, in due and proper form, were filed with the defendant, and that he has failed and refused to certify such nominations to the auditor of Cavalier County. Upon the return of the alternative writ, the defendant moved to quash and set aside the same, on the ground that the allegations did not warrant the relief demanded. By agreement, the defendant also answered, without waiving his motion. The answer admitted, in effect, all the allegations of the alternative writ, except the fusion of the Independent party and the Democratic party in Cavalier County. As to that, it alleged that when the conventions met, in the City of Langdon, the Independent convention was composed of 44 members present in person or by proxy; that the conference committee appointed by said

Independent convention reported against fusion with the Democrats, which said report was duly adopted; that thereupon a fragment of said convention, representing 18 votes in person and by proxy, withdrew, and formed a separate convention, and this fragment subsequently united with the Democrats in nominating the relators. These allegations are admitted by relators.

The contentions of the parties may be thus stated: Defendant contends that as the allegations show that the "Independent and Democrat Party" had no existence at the time of the last general election, it could not have cast five per cent. of the vote cast at that election for member of congress; and as relators come here as the nominees of that party, and not as representing any distinctive principle, they are not entitled, under the clear language of section 498, above quoted, to a place on the official ballot. Again, the delegates of the respective parties that assembled at Langdon on September 30th were chosen as delegates to a county convention of the Independent party or as delegates to a county convention of the Democrat party, and they possessed no inherent power to trasmute themselves into delegates to a convention of the "Independent and Democrat Party," and in so doing they did not reflect their constituency or possess the character of delegates. Further, when the two old parties, under the call of their state organizations, met in Fargo on July 27th, and voluntarily abandoned their old party names, abandoned their separate organizations, and welded themselves into a new party, as the "Independent and Democrat Party," thenceforth the old parties ceased to exist in this state as political entities or parties, and they were without power to call or hold delegate conventions. Lastly, and on the answer,—and conceding for the argument that the foregoing points are not well taken,—he contends that there never was an organization of the Independent and Democrat party in Cavalier County by the union or fusion of the old parties, for the reason that but a minority fragment of the Independent convention united with the Democrats.

Relators contend that none of these questions are before us; that the duties of the secretary of state, in certifying nominations to county auditors, are ministerial purely; and that, if the certificates filed with him are fair on their face, he is without authority to look beyond or outside of the certificates. In this we think relators are clearly right, and a few observations touching the statutes and their construction will disclose our reasons for thus holding. We remark, first, that, if the secretary be clothed with judicial functions to pass upon the legality of all nominations the certificates of which are filed with him, his determinations would be final, as certainly no provisions for appeal or review can be found in the statute, and the decisions of a special tribunal charged with the duty of deciding a special matter are always final, unless the right of appeal be expressly given. 2 Enc. Pl. & Prac. 22. Further, if the secretary be clothed with judicial functions in this matter, then the political policy of the state may often turn upon his decision. The power

is great, and its exercise by an officer universally recognized as political in character would be dangerous, however able and however honest the incumbent might be. For these reasons we should expect to find the power, if conferred at all, conferred in no uncertain terms. And yet confessedly there is no express judicial authority conferred upon the secretary by the statute. At most, it is an implied authority, and, if implied, the means and instrumentalities for its proper exercise are entirely wanting. He can conduct no formal judicial inquiry. He cannot coerce the production of persons or papers. He cannot enforce testimony under the sanction of an oath. His most earnest effort would with equal facility elucidate or suppress the truth. To imply authority under such conditions, the implication must be practically impossible of evasion. But so far is our statute from giving such implied authority that, in our view, it expressly withholds such authority. We call attention to the fact that the certificates of nomination must be filed with the secretary of state, and must contain the name and postoffice address of the person nominated, and must name the office for which he is nominated, and designate the political party or principle represented by the nominating convention. It contains no further information, and all that is given is necessary to the proper preparation of the official ballot. Section 504 declares that, within a time therein specified, "the secretary of state shall certify to each county auditor * * * the name and post office address of each person nominated for such office as specified in the certificate of nomination filed with him." This language is clear, explicit, and final, so far as any authority upon the part of the secretary is concerned. Prima facie, it is his duty to certify to the proper auditors all the nominations properly certified and filed with him.

But we do not agree with counsel for the relators that no power rests anywhere to prevent the certification to the county auditors of nominations not made in some one of the ways pointed out by statute. If no such power exist, then it was utterly useless to provide in what manner nominations should be made, for, however made, they must be certified down. Nor can we agree with counsel that proceedings under section 510, Rev. Codes, can cure these matters. That, we are induced to think, relates solely to errors or omissions on the part of county auditors in printing the official ballots. Certainly, if it can relate to errors further back, it is not exclusive. The certificates filed with the secretary must be kept open to public inspection. There is a purpose in that provision. The secretary is a disinterested party. He has no duty to perform touching such nominations, except to certify them to the proper auditor. That duty every citizen is bound to presume he will perform. But, if improper nominations have been filed, any citizen interested may apply to a Court of competent jurisdiction, where all the facts can be speedily and certainly investigated, and, if nominations other than as prescribed by statute have been filed with the secretary, that officer may be enjoined from certifying the same to the county

auditors. But, if no such restraining order be served, it is the duty of the secretary to certify all nominations proper certificates of which have been filed in his office. The law does not allow him to concern himself whether such nominations were or were not properly made, and when he, of his own volition, refuses to certify such nominations, and parties in interest bring proceedings to enforce the performance of such duty, it is no answer upon his part to say that facts exist which would have enabled the proper party, at the proper time and in the proper manner, to procure an order restraining him from certifying such nominations. No such order having been in fact obtained, the existence of the facts did not release his duty.

It is proper to state that the learned attorneys for relators disclaim even a suggestion of partisan or improper motives on the part of the secretary. He simply found himself in a position where he might well be in doubt as to the proper course to pursue. The peremptory writ will issue as prayed. It is so ordered.

YOUNG, J., concurs.

WALLIN, J., concurs in result, but as to the power of a Court in any case to enjoin the secretary of state from certifying to county auditors the names of nominees whose nominations have been properly certified to such secretary he expresses no opinion.

(76 N. W. Rep. 996.)

JOHN MCTAVISH *vs.* GREAT NORTHERN RAILWAY COMPANY.

Opinion filed October 25, 1898.

Appeal—Statement of Case—Violation of Statutes—Striking from Files.

In this case the statement of the case was settled by the trial court pursuant to a stipulation of counsel. Both the statement of the case and the so-called "abstract" filed in this Court are mere rescripts of the reporter's notes, and embody all the evidence, objections, rulings, and exceptions had or taken at the trial, without an attempt at condensation. A motion is made in this court to strike said statement of the case and abstract from the files of this Court, upon the ground that the same are framed in open disregard of the statutes and rules of this Court and of repeated decisions made by this Court. *Held*, that the motion must be granted. Statements which are framed in violation of the statute and rules of court cannot be authenticated by amicable agreements made by counsel, even when such agreements are sanctioned by the trial court. The preparation of statements of the case, and abstracts thereof, is regulated by statute and rules of this Court, and these cannot be superseded by the combined action of counsel and the trial court from which the record is transmitted. See Thuett v. Strong, 7 N. D. 565.

Appeal from District Court, Pierce County; *Morgan*, J.

Action by John McTavish against the Great Northern Railway Company for damages caused by fire. Judgment for plaintiff. From the judgment and order denying its motion for a new trial, defend-

ant appeals. Motion by plaintiff to strike statement of case and abstract from files.

Motion granted.

W. E. Dodge and *Charles S. Albert,* for appellant.

N. A. Stewart and *J. H. Bosard,* for respondent.

WALLIN, J. This action is brought to recover damages alleged to have been suffered on account of injuries to the person and to the property of the plaintiff resulting from a certain prairie fire, which fire plaintiff avers was negligently started by the defendant upon its right of way. The action was tried to a jury, and resulted in a verdict and judgment for the plaintiff. A statement of the case was stipulated by counsel, and the trial court settled and allowed the same as so stipulated. A motion for a new trial was denied, whereupon judgment was entered for the plaintiff.

A preliminary motion is made in this Court to strike the statement of the case, and the printed abstract thereof, from the record, upon the ground that "there has been an utter disregard of all statutes or rules of this Court in the preparation of the statement of the case and abstract in this case." An inspection of the record discloses that the appellant's printed abstract filed with the clerk of this Court embraces a literal copy of the statement of the case, without any attempt therein to reduce the evidence to a narrative form, or otherwise to condense the evidence, or to abridge the proceedings had at the trial, as such evidence and proceedings were preserved in the stenographic minutes of the trial. The statement of the case on file contains all the evidence introduced at the trial, together with all objections, rulings, and exceptions taken at the trial, as the same were preserved and written out by the official stenographer. No attempt was made in said statement to state only the substance of the reporter's notes; nor did the Court below strike out certain redundant and useless matter from the statement of the case, or any part thereof; nor was the matter embodied in the statement of the case, or any part thereof, reduced to a narrative form, or otherwise abridged, as required in jury cases by section 5467 of the Revised Codes and by rule 13 of the rules of this Court (6 N. D. xviii). See *Elton* v. *O'Connor,* 6 N. D. 19, 68 N. W. Rep. 84. The book denominated an "abstract" contains 214 printed pages. Enough has been said by way of description to show that the statement of the case as settled below, and the printed book called an "abstract" and filed as appellant's abstract of the record, are severally framed in open disregard of the statutes and rules of this Court governing their preparation, and which have, in substance at least, been in force ever since this Court was organized, and have been repeatedly applied and enforced by the decisions of this Court. It is true with respect to the statement of the case that the same was settled and allowed by the trial court in accordance with an agreement thereto made by counsel, but no agree-

ment of counsel was stipulated as to the form or substance of the abstract. But the method of preparing statements and abstracts cannot, in this jurisdiction, be left either to the trial court or the amicable agreements made for the convenience or at the caprice of counsel. The record and the abstract, respectively, have been the subjects of legislation and court rules, and their form, preparation, and constituent parts are vital matters of practice governing new trials and appeals to this Court. The record and the abstracts are mere duplicates, and are nothing less than a rescript of the reporter's notes of the evidence taken, and proceedings had, at the trial, and as such, as has been seen, are in violation of both the statute and rules of this Court. The motion is granted, and the statement and abstract will be stricken from the files. The other judges concurring.

(76 N. W. Rep. 985.)

JAMES E. BLACK *vs.* MINNEAPOLIS AND NORTHERN ELEVATOR COMPANY.

Opinion filed October 25, 1898.

Appeal—Printing Abstract and Brief.

Chapter 38, Session Laws 1897, construed. *Held*, that in cases within the statute either party to an appeal may, at his option, print his abstract and brief, but cannot be required to do so by this court. *Held*, further, that disbursements incurred by such printing are not necessarily incurred in presenting a case to this court for review, and hence such disbursements are not taxable in favor of the successful party, and the same cannot lawfully enter into the judgment.

Disbursement for Printing Disallowed.

In this case, which falls within the statute, the appellant printed its abstract and brief on a former appeal to this court, and disbursed for such printing $59. From an order of the district court disallowing such disbursement, defendant appeals to this court. The order is affirmed.

Appeal from District Court, Traill County; *Pollock*, J.

Action, in the nature of an appeal from the ruling of the clerk of the District Court, by the Minneapolis & Northern Elevator Company against James Black, to recover, as costs, certain disbursements made in a former action in printing an abstract and brief. From a judgment for Black, the elevator company appeals.

Affirmed.

Cochrane & Corliss, for appellant.

Carmody & Leslie, for respondent.

WALLIN, J. The only question presented on this appeal relates to the allowance of the appellant's disbursements made in this court on a former appeal herein in which the appellant was successful. 7

N. D. 129. On the former appeal the appellant printed its abstract and brief, and disbursed in so doing the aggregate amount of $59. There is no controversy as to the fact that the amount stated was actually paid out for the printing. The action was brought to recover $78.65, and resulted in a judgment for the defendant. When the record on the former appeal was sent down, the costs and disbursements were taxed by the clerk of the district court in favor of the appellant, but the clerk refused to allow or tax said disbursements for printing the abstract and brief. On appeal to the district court from the ruling of its clerk, that court entered an order sustaining the ruling of the clerk, thereby disallowing the disbursements in question. From this order the defendant appeals to this Court.

In support of its contention, the appellant argues that the rules of this court sanction, and in effect require, suitors in this court, in appeal cases, to print their abstracts and briefs, and that, pursuant to such rules, the prevailing party has never been denied the right to tax up reasonable disbursements incurred in printing his abstract and brief. Another position of counsel is that this Court, as a tribunal of last resort, is possessed of inherent authority to make the rules which it has made, and that the statute also expressly confers such authority; and they cite, as supporting these positions, section 5168, Rev. Codes, also 5 Enc. Pl. & Prac. 235, and cases there cited. An examination of the provisions of the Code of Civil Procedure discloses that certain arbitrary amounts, denominated "costs," are awarded to the prevailing party by way of indemnity for his expenses in the litigation, and these allowances are given, under the circumstances stated in the statute, both in the Supreme Court and in the District Court. Rev. Codes, §§ 5574-5583. But we have failed to discover any statute of this state which, in terms or by implication, confers authority upon this Court to award suitors any disbursements incurred in presenting their cases to this Court for determination. But, despite this omission in legislation, we have no doubt (in the absence of prohibitory legislation) of the inherent power of this Court to allow reasonable disbursements made in this Court to be included in the judgment, and this could be accomplished, in the discretion of the Court, either by special order or by a general rule of court. The Supreme Court of the Territory of Dakota allowed the prevailing party his reasonable disbursements, and this practice has been continued by this Court, and this Court has uniformly permitted the prevailing party to recover his disbursements in this Court, including, with others, those incurred in printing abstracts and briefs. But the respondent contends that the legislature has prohibited any allowance for disbursements incurred in this Court for printing either abstracts or briefs, and cites chapter 38 of the Session Laws of 1897 as sustaining his contention. We think this contention is clearly right, and must be sustained. The statute states that where "the judgment appealed from,

exclusive of costs, does not exceed three hundred dollars, no printed abstracts or briefs shall be required of either party." It is conceded that the case at bar comes within the terms of the statute, but counsel for appellant argue that the statute does not, in terms or by implication, forbid suitors in this class of cases, or in any case appealed to this Court, to print their abstracts or briefs, if they are disposed to advance the funds necessary to do so; in other words, that the appellant is still permitted to print abstracts and briefs, although not required to do so, and that, because the statute does not prohibit such printing, an appellant who has elected to print should be allowed the expense thereof as a disbursement to be charged to his adversary in cases where the appellant is successful in this Court. We think the construction placed upon the statute by the appellant's counsel is inadmissible, because, if allowed, its effect would be to saddle upon the suitor who is defeated the burden of an expense of which it is the obvious policy of the statute to relieve him. We could not consistently allow any disbursement made by a suitor in this Court which is either unreasonable in amount or that is unnecessary in kind. It is plain that under this statute there was in this case no necessity of printing either the abstract or the brief of appellant, for the reason that the statute declares that in cases like this "no printed abstracts or briefs shall be required of either party." If, therefore, such printing cannot lawfully be required of either party, then to print said abstract and brief was certainly an unnecessary expenditure in this action. We agree with counsel that the statute is permissive, in the sense that either party may, at his election, print the record and his brief; but we are compelled by the terms of the statute to hold that such printing is not a necessary disbursement, and hence cannot be taxed against the defeated suitor. We trust this case will serve to call the attention of the bar to the existing omissions in the statutes with respect generally to the matter of disbursements incurred by suitors in this Court, and also to the anomalous character of the enactment found in chapter 38 of the Laws of 1897, which last is, in our opinion, well worth the careful attention of the bar. This statute covers in its scope the most important litigation and the great majority of cases, both at law and in equity, which are brought in the Courts of the state. It is by no means limited to cases including small amounts, and in which suitors may fairly be supposed to be impecunious. It is safe to say that such broad and sweeping provisions will not be found in any other state. Its enactment has certainly devolved upon this Court and upon counsel practicing here an amount and kind of work which hitherto has been deemed unnecessary labor in the Courts of last resort, and that of such a character as, in our judgment, should not be required to be performed in cases litigated here. The order appealed from is affirmed. All the judges concurring.

(76 N. W. Rep. 984.)

MATHILDA MORRIS *et al. vs.* JOSEPH EWING.

Opinion filed November 4, 1898.

Power of Attorney—Construction.

The defendant and R., his brother, were owners of a tract of land in common. Defendant gave R. a power of attorney to sell all of defendant's right, title, and interest in the land, and to convey the same by deed of warranty. Assuming to act under said power of attorney, as well as in his own behalf, R., to secure a loan of $500, executed and delivered to the lender a mortgage upon said land. *Held*, that the power of attorney to sell and convey by deed of warranty conferred no authority upon R. to mortgage the interest of the defendant.

Evidence Examined.

Certain evidence considered, and *held*, that the same is insufficient to convince this Court, when sitting to try the case de novo, that the defendant participated in the loan transaction by accepting any part of the borrowed money, and hence that defendant is not estopped from claiming title to his interest in the land.

Estoppel Must Be Pleaded.

Whether an equitable estoppel in pais is required to be pleaded, considered, but, not being discussed by counsel, nor necessary to a decision, the point is not decided.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by Mathilda Morris and others against Joseph Ewing. Judgment for plaintiff, and defendant appeals.

Reversed.

Bosard & Bosard, for appellant.

E. W. Conmy, for respondents.

WALLIN, J. This action was brought, under the statute, to quiet title to a quarter section of land situated in the County of Pembina. The following facts are conceded: That the land in question was on the 7th day of August, 1882, owned by the defendant, Joseph Ewing, and his brother, Robert Ewing, as tenants in common. That on the day stated, Robert Ewing, acting in his own behalf, and also assuming to act as the attorney in fact of his brother, the defendant, executed and delivered a mortgage in due form on said land to one William Camp, to secure a loan of $500 then paid over to Robert Ewing by said Camp. The mortgage was subsequently foreclosed by advertisement, and the premises were purchased by Camp at the foreclosure sale in the month of July, 1887; and thereafter, and in July, 1888, said Camp, after receiving a sheriff's deed pursuant to such foreclosure, conveyed the land to one Frank Morris. That said Morris died in October, 1895, and the plaintiffs, who are the heirs at law of Morris, claim title to the entire land, under a decree of the Probate Court of said county awarding title to the plaintiffs. It is further conceded that prior to the execution of the mortgage a certain power of attorney was made by the defendant to his brother, Robert, which was duly recorded, and the same was

in full force when said mortgage was made and delivered. By the terms of said power of attorney said Robert Ewing was authorized, in explicit language, to sell all of defendant's interest in said land, and to convey the same by deeds of warranty. Nothing was said in the power of attorney about mortgaging the land. The defendant, by his answer to the complaint, alleges title and ownership of the land in fee simple in himself, and prays that a decree be entered quieting the title in himself, and awarding him possession of the land, and for general relief in equity. The District Court entered a judgment in favor of the plaintiffs, quieting the title of the plaintiffs to the whole of said premises, and excluding the defendant from any interest in the land.

The only findings of fact made by the trial court which are now controverted are the following findings: First. "That the mortgage of five hundred dollars hereinbefore referred to, given by Joseph Ewing, by Robert Ewing, under power of attorney, was given to secure a debt of five hundred dollars; that said debt was for the loan of money made by said William Camp to and for Robert Ewing and Joseph Ewing; that Joseph Ewing received a portion of the money from said loan." Second. "The Court further finds that the said Joseph Ewing knew of the foreclosure proceedings, and that between the foreclosure sale and issuance of the deed by the sheriff he acknowledged and recognized the mortgage thereon as valid and binding, and agreed to pay the same." Appellant's contention is that these two findings of fact are not supported by the evidence. No evidence was offered at the trial in defendant's behalf, and it is conceded that he was not present at the trial. It is also conceded that the defendant at the time of the trial, and for some years prior thereto, was a nonresident of this state, and lived in the Dominion of Canada. Defendant's counsel seemed to rely at the trial wholly upon his contention that said power of attorney conferred no authority whatever upon the defendant's brother to incumber the land by mortgage. This contention is undoubtedly sound, and must be sustained. The rule is now firmly established that a mere power to sell and convey by deed of warranty does not carry with it, by implication, a power to incumber land by mortgage. The power to execute a mortgage upon land does not confer authority which is merely less in degree than the power to sell. The power to mortgage is one distinctly differing in its nature from the authority to sell and convey. Many authorities might be added to those cited below in support of this well-established rule of property. *Wood* v. *Goodridge*, 52 Am. Dec. 771; *Jeffrey* v. *Hursh*, 49 Mich. 31, 12 N. W. Rep. 898; *Insurance Co.* v. *Bay*, 4 N. Y. 9; *Kinney* v. *Mathews*, 69 Mo. 520; *Morris* v. *Watson*, 15 Minn. 212 (Gil. 165); *Campbell* v. *Association* (Pa. Sup.) 30 Atl. Rep. 222; *Lamy* v. *Burr*, 88 Am. Dec. 135; 1 Jones, Mortg. 129; *Switzer* v. *Wilvers*, 24 Kan. 384.

Applying this rule to the facts of this case, the defendant is entitled to a decree quieting the title in himself to an undivided one-

half interest in the land in question, unless he has in some manner ratified the mortgage, or otherwise estopped himself from asserting title to the land. It cannot be claimed that the evidence shows or tends to show any formal ratification on defendant's part, either of the mortgage, or of any title acquired under the mortgage. Authority in writing is indispensable to an agency to mortgage land, and where, as in this case, a mortgage upon the land is executed by one who without authority assumed to act as an agent of the owner, any act of ratification on the part of the owner, to be valid, must be evidenced by some writing. Upon this point a provision of the Civil Code voices an elementary principle. Section 4315, Rev. Codes, reads, "A ratification can be made only in the manner that would have been necessary to confer an original authority for the act ratified, or when an oral authorization would suffice, by accepting or retaining the benefit of the act with notice thereof." There is no pretense in the case at bar that the defendant ever made a written ratification of the mortgage, or attempted to do so. Certain evidence hereafter set out is relied upon as sustaining the second finding of the trial court above quoted, which declares that "between the sale and issuance of the deed by the sheriff he (the defendant) acknowledged and recognized the mortgage thereon as valid and binding, and promised to pay the same." We do not think the evidence tends to show an express oral promise to pay the mortgage, but, as we have seen, an explicit oral agreement, made after the execution, delivery, and foreclosure of this mortgage, to pay the same, would be wholly inadequate, and would not operate as a valid ratification, either of the mortgage, or of any title acquired thereunder. The testimony of William Camp, the mortgagee, was given, and tends to show that all negotiations for the loan were made by Robert Ewing, and that the defendant did not participate personally in such negotiations, and was not present when the money loaned was paid over to Robert, nor when the mortgage was executed and delivered to Camp. Nor is there any evidence in the record showing that the defendant had any knowledge of the existence of the mortgage until some time long subsequent to the execution and delivery of the mortgage. Just when defendant first learned of the mortgage, does not appear. But Camp testified, against objection, that the loan was solicited by Robert Ewing as a loan for the use of both Robert and Joseph. It is clear, however, that inasmuch as it does not appear that the defendant had clothed his brother with any authority to either make the loan or execute the mortgage, and was not present at the time, defendant was not estopped by any representations made by Robert in obtaining the loan or in making the mortgage. This witness also testified to a conversation had with the defendant as follows: "I spoke to Joseph Ewing about removing the timber off, and he said he would pay me for the timber; he would make it all right; I should not lose anything." The date upon which this talk occurred does not distinctly appear. It probably occurred soon after

the foreclosure sale. Upon this feature Francis A. Hart also testified in effect as follows: "I heard a conversation between Mr. Joseph Ewing and Mr. Camp. I was standing near, and, after I went out, Mr. Ewing met me between the corner and his place, and he says, 'We have cut wood on this place all right, and we have been selling it to pay the mortgage.' It was either fifteen or eighteen cords. And he says, 'I agreed to pay Major Camp for this wood.' And he says, 'I don't know how we are going to raise the money to redeem this place.'" It is apparent from this feature of the evidence that at the time the two conversations testified to, relating to cutting timber off the land, occurred, the defendant stated first, and in the conversation with Camp, that he would pay for the timber so cut from the land, and, in the conversation testified to by Hart, defendant stated that he agreed to pay for some wood,—15 or 18 cords,—which the defendant and some other person had cut on the land. In the same conversation the defendant said, "I don't know how we are going to raise the money to redeem this place." Comment upon this evidence is unnecessary to show that the same is not, and does not purport to be, even an oral ratification of the assumed agency of Robert Ewing in making the mortgage, nor does it purport to contain a promise to pay the debt evidenced by the mortgage. Hence these conversations fail utterly to establish any ratification of the assumed agency of Robert Ewing. At furthest, these conversations show only a purpose of the defendant to pay for certain timber, and possibly imply some obligation, either legal or moral, to do so; but the basis of such obligation, whether legal or moral, nowhere appears in the evidence. Upon the supposition that the defendant considered himself at that time bound by the mortgage, he certainly was not bound to pay for all timber cut, and yet this seems to have been the purport of the conversations we are considering. But, as we have said, these conversations, all and singular, do not tend to establish a ratification on defendant's part.

The only other evidence relied upon, or in the record, tending to support the finding of the trial court that "Joseph Ewing received a portion of the money from said loan," is that of one Merrick, who testified that he knew the parties to this action, and that they gave a mortgage to William Camp, and further testified: "I have had a talk with Joseph Ewing, the defendant, about this mortgage. This conversation was this, or nearly this: Robert Ewing and Joseph Ewing was in my office one day, and they were talking about Major Camp making some objection to cutting wood off from a piece of land up the river,—this Pembina river; and Joseph Ewing made the remark that Robert had got the money from the old man, and mortgaged it to him, and we don't want to beat him out of anything, and didn't want to let anybody cut wood on it; that they intended to pay him up everything. This conversation occurred between myself and Joseph Ewing. Q. Did he admit that he had mortgaged the land to Major Camp? A. His remark, as

near as I can remember it, was that 'we mortgaged it;' meaning Joseph Ewing and Robert Ewing together. Q. At the time they were joint owners—Robert Ewing and Joseph Ewing—of this property? A. To my best knowledge, they were. Q. Did Joseph Ewing tell you they were joint owners, or Robert Ewing? A. He gave me to understand 'we have mortgaged the land to Major Camp.' I don't think there was more conversation about ownership, but he says, 'We have mortgaged that to Major Camp, and got his money, and we propose to pay him.' That was the substance of the conversation." It is strenuously contended that this evidence is, in effect—First, an admission that the mortgage, when made, was intended to be the joint mortgage of Robert and Joseph Ewing; and second, an admission by the defendant that he personally received a portion of the money loaned on the security of the mortgage. As to the first branch of the alleged admission, it is needless to say that any admission made by the defendant in a casual conversation had with a stranger at a time not less than five years subsequent to the execution and delivery of the mortgage would not operate to validate the mortgage as a joint mortgage, if it was not such in law. The conversation referred to might, however, throw some light upon the views entertained by the defendant at that time touching the character and legal effect of the instrument; but his views at that time would be entirely unavailing, either to build up or destroy any legal rights or obligations arising under the instrument.

But it is contended by counsel for the plaintiffs that the evidence of Merrick shows that the defendant participated in the fruits of the mortgage, by receiving a portion of the borrowed money, and that by so doing an equitable estoppel arises, which prevents defendant from now claiming the land, and consequently operates to validate the mortgage, and to confirm all rights derived under it. It is doubtless correct, as a legal proposition, that, where a party elects to accept the fruits of a transaction, he will be held to be estopped from claiming both the fruits and the property from which the same are derived. After accepting the benefits of a transaction, a party will not be permitted to repudiate the transaction. This established rule or doctrine of equity is expressed in Rev. Codes, § 3865, as follows: "A voluntary acceptance of the benefits of a transaction is equivalent to a consent to all the obligations arising from it so far as the facts are known or ought to be known to the person accepting." See, also, *O'Shea* v. *Rice* (Neb.) 69 N. W. Rep. 308; *Beidman* v. *Goodell* (Iowa) 9 N. W. Rep. 900; *Nichols* v. *Shaffer* (Mich.) 30 N. W. Rep. 383 (see authorities in note at end of the case); *Wendell* v. *Van Rensselaer,* 1 Johns. Ch. 344, and cases cited in notes; *State* v. *Stanley,* 14 Ind. 409; *Smith* v. *Warden,* 19 Pa. St. 424; *Mathews* v. *Gilliss,* 1 Iowa 242; *Haynes* v. *Seachrest,* 13 Iowa 455; *Deford* v. *Mercer,* 24 Iowa, 118; Herm. Estop. & Res. Jud. § 931; Mechem, Ag. § 148; *Grogan* v. *San Francisco,* 18 Cal. 590; *Borel*

v. *Robbins,* 30 Cal. 409; *Delano* v. *Jacoby,* 96 Cal. 275, 31 Pac. Rep. 290. But, after a very careful consideration and review of the evidence in the light of the law of the case, we are constrained to hold that the same is not, in our judgment, of sufficient weight and credibility to establish the fact that the defendant received any part of the borrowed money. We remark first that, aside from the testimony of Merrick, there is not a scintilla of evidence in the record to establish the fact of such acceptance. It should be further noted that the evidence relied upon consists of a certain conversation which the witness claims to have overheard between the two brothers, and in which the witness does not appear to have had any reason to participate personally, and concerning which it does not appear that the witness had any interests to subserve, or connection whatsoever, or any reason to remember the same. The abstract fails to disclose the exact date of the conversation referred to, but it is conceded that it occurred, if at all, at least six or eight years prior to the date of the trial at which the testimony was given, and several years subsequent to the execution of the mortgage. A careful scrutiny of this testimony will further disclose the fact that the same is directly self-contradictory upon the crucial question of accepting the proceeds of the loan. In one part of his testimony Merrick states as follows: "Joseph Ewing made the remark that Robert had got the money from the old man, and mortgaged it to him." This is explicit, and accords with the claim made by the defendant's counsel to the effect that Robert alone made the loan, and that the defendant did not either authorize the loan, or receive any part of the funds borrowed. It is true that the witness, on being pressed and repeatedly questioned by the plaintiffs' counsel, puts a different construction upon this far-away conversation, and declares that he understood the defendant to state as follows: "We have mortgaged that to Major Camp, and got his money, and we propose to pay him." There is no explanation in the record of this discrepancy in the evidence. It does not appear why the defendant stated as he did (referring to his brother and himself), "We got his money, and we propose to pay him." It is enough to say that the latter statement is in square opposition to the former upon both features, viz: as to making the mortgage and as to receiving the money. It is enough to say that the character of the evidence is unconvincing, and is of such a nature and grade that it fails to establish an equitable estoppel to our satisfaction. It is the settled policy of the law that titles to real estate shall be safeguarded by written documents duly recorded in an official registry. Nor can estates in land be transferred or divested by mere spoken words. Estoppels are said to be odious, and it is well settled that the evidence necessary to defeat a perfect legal title to real estate evidenced by deeds regularly recorded must be clear, strong and convincing. This record fails to embody any such evidence upon the direct question of participation in the proceeds of the loan. Not only are these alleged declarations of the de-

fendant uncorroborated by other evidence, but the same, being mere verbal declarations, belong to a class of evidence which experience has shown to be very untrustworthy, *i .e.* evidence which is received by courts with great caution in any case, and particularly where it is sought by mere verbal admissions to build up an equitable estoppel. See 1 Greenl. Ev. § § 45, 200; 2 Rice, Ev. p. 441. But counsel argue that, if the defendant never did accept any part of the borrowed money, it would have been an easy matter for him to take the stand and declare under oath that he did not do so. This argument is specious, but, when the issues involved in the case are considered, its strength is wholly dissipated. What were the issues? The very brief complaint declares that the plaintiffs are the owners in fee simple of the whole land in controversy. It contains no intimation that the plaintiffs depend wholly or at all upon an equitable estoppel in pais to establish title to the interest of the defendant in the land. The answer alleges ownership in defendant, but goes further, and asks for affirmative relief, ousting the plaintiffs from possession and quieting title in defendant. This answer embodied a counterclaim. See *Betts* v. *Signor,* 7 N. D. 399, 75 N. W. Rep. 781 and cases there cited. To this counterclaim no reply was made by the plaintiffs. A motion for judgment for want of a reply would therefore have been proper in the trial court. Rev. Codes, § 5278. No such motion was made, but we note the fact that the defendant at the trial persisted in objecting to all of the evidence offered by plaintiffs in support of the feature of estoppel, upon which alone plaintiffs depended for success in the action. The point was not made by counsel either at the original argument or upon the reargument, but we strongly incline to the view that the failure to reply was not waived, and that the burden was upon the plaintiffs to allege, by way of reply to the counterclaim, the very facts which they sought to establish by evidence, and which it is claimed constitute the equitable estoppel. Had such facts been set out in a reply to the counterclaim, the defendant would have been apprised in advance of the facts which were sprung for the first time in eliciting the evidence. If defendant did not in fact receive any part of the borrowed money, he would have no reason whatever to suppose in advance of the trial that any such evidence would be offered, or any such claim made, by plaintiffs. It appears, therefore, that upon the issues as framed by the pleadings the defendant is not guilty of any laches in not appearing personally for examination as a witness. He might, as a prudent man, rest upon the advice of counsel, and remain away from the trial, and do so upon the assurance of his counsel, advisedly made, that his case rested wholly upon documentary evidence, which could be obtained easily by counsel without defendant's personal attendance in court. Had the point been urged upon our attention, we are now inclined to think that we would have excluded all evidence of the facts constituting the alleged estoppel, upon the ground that the plaintiffs had failed to allege the controlling facts of their case, *i. e.* the

equitable estoppel. But as this question is new in this jurisdiction, and involves a point of some doubt, under the authorities, we are not inclined to pass upon it hastily, nor until the same is discussed by counsel, and hence we shall not further consider it in the case at bar.

The case will be reversed upon the ground that plaintiffs, having the burden, have failed to establish the fact to our satisfaction that the defendant participated in the loan by accepting the proceeds, or any part thereof, and upon the ground that the defendant has never ratified the mortgage in any legal manner, or at all. The Court below will enter a judgment quieting defendant's title to an undivided one-half interest in the land described in the complaint, and awarding defendant his costs and disbursements. It is proper to add, in view of the fact that the views of this Court have been wholly changed with respect to the disposition of this case, that Judge Corliss, who participated in the original decision of the case, and who has resigned his office since the case was first decided, participated in the order granting the rehearing, and is now entirely satisfied with the final disposition made of the case.

BARTHOLOMEW, C. J., concurs.

YOUNG, J., having been of counsel, did not sit in the case, or take any part in the decision.

(76 N. W. Rep. 1047.)

MAGNUS BRYNJOLFSON *vs.* THE TOWNSHIP OF THINGVALLA.

Opinion filed November 9, 1898.

Appeal—Statement of Case—Striking Out Record.

Construing section 5630, Rev. Codes. In this action no statement of the case was ever settled. In lieu of a statement, the trial judge transmitted to this Court certain papers, to which he appends a certificate to the effect that the same embrace all the evidence and proceedings had at the trial upon which the findings were made. A motion in behalf of the respondent to strike out all of the record sent to this Court, except the pleadings, findings, and judgment, was granted. A mere rescript of the evidence and proceedings as preserved by the reporter does not constitute a statement of the case, and will not be so regarded in this Court.

Assignments of Error.

Certain assignments of error subjoined to the appellant's brief considered, and *held* to be insufficient, under rule 12 of the rules of this Court. 6 N. D. xviii.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by Magnus Brynjolfson against the Township of Thingvalla. From a judgment for plaintiff, defendant appeals.

Affirmed.

W. R. Garrett, for appellant.

W. J. Kneeshaw (*Cochrane & Corliss* of counsel) for respondent.

WALLIN, J. This action originated in a Justice's Court, and was brought to recover the sum of $50, which plaintiff claims to be due him for services rendered as an attorney at law. The action was removed to the District Court by appeal, and was there tried to the Court without a jury in April, 1896, and is therefore governed by the provisions of section 5630, Rev. Codes. The trial court, after the production of the evidence, made and filed its findings of fact and conclusions of law; and, pursuant thereto, judgment was entered in the District Court in favor of the plaintiff for the amount sued for, with costs. Whereupon the defendant appealed from said judgment to this Court.

When the case was reached in this Court a preliminary motion was made by the respondent's counsel to strike out the entire record, except the statutory roll, to-wit: "Except the summons, complaint, answer, findings of fact and conclusions of law, and the judgment." This motion was based upon the conceded fact that no statement of the case has ever been settled or allowed in this action. At the same time a motion was made in respondent's behalf to strike from the printed abstract on file all the matter sought to be stricken from the record by said first motion, and also certain matter printed in the abstract, and denominated "specifications of errors." An inspection of the record discloses that no statement of the case is contained therein, and with respect thereto the trial court certifies as follows: "That the foregoing transcript is hereby settled and allowed, and transmitted in lieu of a statement of the case, on account of the brevity of the testimony." The testimony and exhibits together, it appears, constitute all the evidence and proceedings in the case had and taken in the District Court. Said motion to strike out a part of the record was granted, and it followed that corresponding parts in the abstract of the record must disappear and be striken out also. Under section 5630 of the Revised Codes, it is incumbent upon an appellant who desires to review the evidence in this Court to frame the settlement of a statement of the case, embracing the evidence in a narrative form, and including specifications. This was neither done nor attempted by the appellant in this case, but in lieu thereof we find a mere certificate of the trial judge, annexed to certain unauthenticated documents, to the effect that the same embraces all the evidence, exhibits, etc., upon which the Court acted in making its findings. A mere transcript of the evidence thus certified does not constitute a statement of the case, within the meaning of the Code, nor can such a transcript be substituted for a proper record upon which this Court can review the findings of fact for the purpose of deciding whether the same are justified by the evidence. See *Wood* v. *Nissen*, 2 N. D. 26, 49 N. W. Rep. 103.

After striking from the files of this Court all matter appertaining to the trial of this action in the District Court, including the evi-

dence adduced and the proceedings had at such trial, there remain for the consideration of this Court only the pleadings, and the findings of law and fact made by the District Court, and the judgment. Turning to the assignment of error subjoined to the brief of the appellant's counsel, we find that such assignments embrace five propositions, none of which can properly be considered by this Court. Nearly all of such assignments relate to matters striken from the record, and hence not before this Court for consideration, and none of the assignments can refer to specifications of error. There are none in the record. None of such assignments are leveled at the pleadings. The Court finds that all the allegations of the complaint are true. In the attempted assignment of error this finding is criticised by the general statement that the same does not constitute a finding of fact. But counsel does not specify wherein it is defective, and hence the assignment is not sufficiently specific, under the rule. Such findings, however, while not commended as good practice, are nevertheless sustained. See Hayne, New Trial, pp. 723, 724. Another assignment states in general terms that the conclusion of law found by the trial court is against law and against the evidence, and not based upon a sufficient finding of fact. This is not sufficiently specific to meet the requirements of rule 12 of the rules of this Court. Not being permitted to look into the evidence in this case, we do not feel at liberty to exercise a discretion which will allow this Court to relax the requirements of rule 12, (6 N. D. xviii), as in exceptional cases may be done in furtherance of justice. Finding no error in the record before this Court, an order will be entered affirming the judgment of the Court below.

BARTHOLOMEW, C. J., concurs.

YOUNG, J., having been of counsel, took no part in the above decision.

(77 N. W. Rep. 284.)

FREDERICK STOLZMAN *vs.* HENRY WYMAN, *et al.*

Opinion filed November 11, 1898.

Bills and Notes—Payment—Estoppel.

The fact that the indorsee of a negotiable promissory note permits or authorizes the original payee to collect the interest upon such note as it becomes due, and delivers to the said payee the coupon notes, to be delivered to the party making the payments, and the further fact that such party makes said interest payments, believing without inquiry, that such original payee is the owner of said note, do not estop said endorsee, who has kept the principal note in his possession at all times since its indorsement to him, and who has never in any manner authorized the original payee to collect the principal of said note, and who never in fact received said principal or any part thereof, from enforcing payment against one standing in the shoes of

the maker of such note, who forwarded the full amount of the principal of said note to the original payee. Hollinshead v. John Stuart & Co., ante poge 35 followed.

Implied Agency.

The fact that a negotiable promissory note is made payable at a particular office does not make the party in charge of said office the agent of the holder of such note, to receive payment, unless the note be actually in the possession of such party. Same authority.

Appeal from District Court, Cass County; *Pollock,* J.

Action by Frederick Stolzman against Henry Wyman, as receiver of the Globe Investment Company, and Benjamin Gathercole. There was a judgment for plaintiff and defendant Gathercole appeals.

Reversed.

Morrill & Engerud, for appellant.

Benton & Bradley, for respondent.

BARTHOLOMEW, C. J. Action by Fredrick Stolzman to quiet title in himself to a certain tract of land in Cass County. Plaintiff claims ownership by purchase from one William Schultz on or about March 15, 1892, and alleges that the defendants claim an estate or interest in said land adverse to the plaintiff, and asks that they be required to disclose the nature of their interest. Henry Wyman was sued as receiver of the Globe Investment Company. He makes no appearance. The defendant Benjamin Gathercole answered in denial, and also by way of counterclaim, wherein he alleged that William Schultz, plaintiff's grantor, on the 15th day of July, 1889, executed and delivered to the Globe Investment Company his promissory note, with coupon interest notes attached, for the sum of $1,300, with interest at the rate of 7 per cent. per annum, payable semi-annually, with a further provision that in case said note was not paid at maturity the interest then remaining unpaid should draw interest at the rate of 12 per cent. per annum (both principal and interest being payable at the office of the Globe Investment Company, in Boston, Mass.); that, to secure the payment of said note and interest, the said Schultz executed and delivered to said Globe Investment Company a mortgage upon the land here in controversy, which said mortgage was duly recorded in the proper county; that the defendant Gathercole on or about July 30, 1889, duly purchased said note and mortgage from said investment company, paying therefor the full face value thereof, and the said note was duly indorsed by said investment company and delivered to said defendant, and said mortgage was duly assigned and delivered to defendant, but said assignment was never recorded in the county where the land is situated; that said defendant is now the owner and holder of said note and mortgage, and that the principal sum of said note, with interest as therein provided, since the maturity thereof, is due and entirely unpaid; further, that when plaintiff purchased said land from said Schultz

the amount of said note was treated as a part of the purchase price, and plaintiff assumed and promised and agreed to pay the same. Upon this counterclaim the usual judgment and decree of foreclosure, with judgment for deficiency against plaintiff, is prayed. We find in the record no reply to this counterclaim, but the case was tried upon the theory that a reply setting up an equitable estoppel had been served, and we shall so treat it. On the trial there was no dispute about the facts. An agreed statement was filed, including the substantial allegations of the pleadings as above set forth, and stating further that, after the purchase of the land by plaintiff, he forwarded the money to pay the interest upon said note, as the same became due, to the Globe Investment Company, at Boston, Mass., and received from said investment company the coupon notes; that shortly after the maturity of said note, to-wit, on July 20, 1894, the said plaintiff forwarded to said investment company the full amount of the principal of said note; that the interest money so forwarded was accounted for by said investment company to said defendant Gathercole, but that no part of the principal had ever been received by said defendant. Plaintiff rested upon this agreed statement, and the defendant read in evidence his own deposition, taken at the City of Colebrooke, in the State of New Hampshire, from which it appears that he is the owner of the note and mortgage; that such instruments were in his possession in said City of Colebrooke at all times from the date of purchase, about July 30, 1889, until sent to his attorneys in this case; that they were never, after said purchase, in the possession of the Globe Investment Company; that he never authorized said investment company to collect the principal of said note, and had no knowledge whatever that the same had been collected by said company until after it went into the hands of a receiver; and that he had never received any part of said principal sum. The note and mortgage were introduced, and the case submitted to the Court, and a decree rendered for plaintiff.

We have stated the facts thus at length in order to show that this case, in its every phase, is covered by the decision of this Court in *Hollinshead* v. *John Stuart & Co.*, 8 N. D. 35, 77 N. W. Rep. 89. In that case we took occasion to enter at some length into the investigation of the question of equitable estoppel in pais. We at first reached a conclusion sustaining an estoppel, under the facts. But upon a rehearing, and upon further argument, and a more careful and extended examination, we reversed our first determination, and held that the facts did not constitute an estoppel. The facts in that case were in all material parts identical with the facts in the case at bar. That decision must control this case. Plaintiff did not make payments to the investment company as the agent or ostensible agent of any party. He paid to it, blindly believing that it was the owner of a negotiable note which he knew was liable to pass from its hands at any moment. He paid without inquiring as to the ownership or possession of the note. The result of his lack

of common prudence is grievous, but we cannot shift the burden upon the innocent creditor, unless we are ready to seriously impair the negotiability of commercial paper. It is the judgment of this Court that the District Court of Cass County set aside its judgment heretofore entered in this case, and enter a judgment in favor of the defendant Gathercole and against plaintiff for the principal sum of said note, with interest and attorney's fees as therein provided, with the usual decree of foreclosure, and an order for the sale of said land in said mortgage described, with execution against plaintiff for the deficiency, if any. Defendant to have costs of both Courts. It is so ordered. Reversed. All concur.

(77 N. W. Rep. 285.)

JOHN C. OSWALD & CO. *vs.* PATRICK MORAN, *et al.*

Opinion filed November 11, 1898.

Intoxicating Liquors—Moneys Paid on Illegal Sales—Demand.

Construing section 7621, Revised Codes, relating to the traffic in intoxicating liquors: In an action upon a joint promissory note, the defendants answered jointly, setting up a claim against plaintiffs for moneys paid on account of illegal sales of intoxicating liquors made by the plaintiffs to one of the defendants; but the answer omitted to allege any demand for the return of the money so paid to plaintiffs. Plaintiffs demurred to such answer upon the ground that the same failed to state facts sufficient to constitute a counterclaim or defense. The trial court overruled the demurrer. *Held* error. The demurrer should have been sustained, inasmuch as the action arises under a statute which makes a demand a condition precedent of recovery.

Appeal from District Court, Stutsman County; *Glaspell,* J.

Action by John C. Oswald and Theodore Basting against Patrick Moran and Margaret Moran for the foreclosure of a real estate mortgage securing a promissory note for $2,966.66 and interest. The defendants admitted the execution and delivery of the note and mortgage sued upon, but counterclaimed for $4,662.37 moneys alleged to have been paid to plaintiff for the purchase of intoxicating liquors by the defendant Patrick Moran, which liquors were purchased for illegal sale within the State of North Dakota. From an order overruling a demurrer to the answer, plaintiffs appeal.

Reversed.

Charles G. Laybourne, for appellants.

Conklin & Murphy, for respondents.

WALLIN, J. This action was brought upon a promissory note executed and delivered to the plaintiffs by the defendants Patrick Moran and Margaret Moran on the 16th day of January, 1895. Said note was made and delivered in payment or in renewal of a

previous note which had been given in settlement of an account which the plaintiffs then had against said Patrick Moran. The execution and delivery of said note is admitted by the defendants Patrick Moran and Margaret Moran, who answer the complaint jointly. Said answer further embodies an itemized statement of divers sums of money alleged to have been paid over by Patrick Moran to the plaintiffs on account of intoxicating liquors sold by the plaintiffs to said Patrick Moran at divers times since the existing statute known as the "Prohibitory Liquor Law" went into effect, to-wit, since July 1, 1890. The answer further states that said sums of money were paid to the plaintiffs by said Patrick Moran for intoxicating liquors sold to him, and smuggled into this state, with the express view and intention on plaintiffs' part of aiding and assisting said Patrick Moran in his business of selling intoxicating liquor illegally within this state. The defendants plead said payments of money, with interest thereon, as a counterclaim in favor of Patrick Moran against the cause of action stated in the complaint, and demand judgment in favor of Patrick Moran for the amount due him on account of said payments, after deducting the amount found to be due on said note. To this answer plaintiffs interposed a demurrer upon the ground that the same does not state facts sufficient to constitute a defense or counterclaim. A hearing was had before the District Court upon the issues of law joined by said demurrer, and that Court entered its order overruling said demurrer. Plaintiffs appeal to this Court from the order.

The principal question for this Court to determine is whether the affirmative matter set up in the answer constitutes a cause of action in favor of the defendant Patrick Moran and against the plaintiffs, which existed at the commencement of this action. See Rev. Codes, § 5274. The alleged counterclaim manifestly would not constitute a cause of action at common law, and no such claim is made. Avowedly, the claim is strictly of statutory origin, and arises under the following provisions of the prohibitory liquor law of this state, now found within section 7621 of the Revised Codes: "All payments and compensations for intoxicating liquors sold in violation of this chapter, whether such payments or compensation is in money, goods, land, labor or anything else whatsoever, shall be held to have been received in violation of law and against equity and good conscience and to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay on demand to the person furnishing such consideration the amount of said money or the just value of such goods and labor or other things." The demurrer admits the fact that the payments of money by Patrick Moran to the plaintiffs were in fact made as stated in the answer, and the pivotal question arising upon such admission is whether such payments constitute a cause of action; and the solution of this question, if decided adversely to the defendants, does not necessarily require this Court to determine whether, in a case like this, where the suit is upon a joint demand, a cause

of action in favor of one defendant may be set off against such joint demand. It is clear that, if the answer does not state a defense or a cause of action in favor of anybody or against anybody, the demurrer should have been allowed. In our opinion, the answer fails to state a cause of action, in this: that it omits to allege that a demand such as the statute requires was made. We hold that such demand is an essential prerequisite, and that no cause of action arises on account of such payments of money until the demand is made. Under the statute a counterclaim upon contract can arise only upon a cause of action existing in favor of a defendant at the commencement of the action. Rev. Codes, § 5274, subd. 2. The provision of the statute under which the defendant's claim arises (Id. § 7621) is copied literally from the liquor law of the State of Iowa, and was enacted in that state several years prior to its passage by the legislature of the State of North Dakota. See 1 McClain's Code Iowa, § 2407. The particular provision of the statute we are here discussing has been frequently considered and construed by the Supreme Court of the State of Iowa; and that Court in a case decided in the year 1888, and prior to the enactment of the statute by the legislature of this state, has squarely met and passed upon the identical question involved in the case at bar. See *Schober* v. *Rosenfield*, 75 Iowa 455, 39 N. W. Rep. 706. Upon the question of demand the Court in its opinion in that case uses the following language: "The second question certified is as follows: 'Can a suit be brought for the purchase price of liquors unlawfully sold, without first making a demand for the money thus paid for the liquors by the plaintiff, and is the bringing of the suit a sufficient demand?' The law provides that the consideration paid for intoxicating liquors sold in violation of law shall be held 'to have been received upon a valid promise and agreement of the receiver, in consideration of the receipt thereof, to pay, on demand, to the person furnishing such consideration,' its amount or value. He is to pay it, not because the sale was illegal, although that is a condition of his liability, but because of a valid agreement so to do, made by operation of law as a result of the illegal sale and receipt of the consideration. By the terms of this agreement the obligor is required to make payment on demand, but not before. A demand is necessary to fix his liability. It was not fixed by the illegal sale, nor by the lapse of time. We therefore conclude that the rules governing ordinary agreements for the payment of money on demand should govern in this case. The judgment of the District Court is reversed. It is a well established general rule of construction that, when a statute is taken from another state and re-enacted by the legislature without any changes being made in its phraseology, such statute is adopted together with the construction placed upon it, if any, by the Court of last resort in the state in which the law was originally enacted. This rule has been frequently applied by the

Courts of this country, and it rests upon a strong presumption that the legislature sanctioned the law as judicially interpreted, and understood its provisions as they have been construed authoritatively by the Courts from whence it came. This Court applied the rule in a recent case. See *Cass Co.* v. *Certain Lands of Security Imp.* Co. 7 N. D. 528, 75 N. W. Rep. 775.

Aside from the reason already advanced,—which alone, in our opinion, would require a reversal of the order appealed from,—we are satisfied that the statute in question was properly construed in the Iowa case we have cited; and this despite the somewhat ambiguous language used in the concluding portion of the opinion in that case. We are far from being of the opinion that the case should be disposed of "by the rules governing ordinary agreements for the payment of money on demand." The ordinary rule in such agreements, especially if the same are in writing, is that no demand is necessary. See *Gammon* v. *Everett,* 43 Am. Dec. 255; *Wheeler* v. *Warner,* 47 N. Y. 519; *Halleck* v. *Moss,* 22 Cal. 266. But the case at bar does not fall within the ordinary rule, and is readily differentiated from the cases which do. Ordinarily a promise to pay money on demand is based upon a pre-existing valuable consideration. In such cases the promise is only the evidence of an existing obligation, which arises independently of the promise to pay on demand. But in the claim of the defendants against the plaintiffs there is no antecedent consideration to support it. It arises wholly under a statute, and exists, if at all, by force of the statute, and is not, therefore, based upon any legal obligation to pay, aside from that created by an arbitrary enactment providing that the money paid for intoxicating liquor may be recovered back under the circumstances stated in the statute. The mere fact of paying over the money for the liquor does not create an obligation to return it to the purchaser. The statute makes no such provision and imposes no such obligation. And it is obvious that no such agreement was made between the buyer and seller of the liquors. In short, affirmative action on the part of the buyer becomes necessary before any legal obligation to return the money arises. The promise of the purchaser annexed by the statute to the agreement of the parties is not an unconditional promise. The promise injected into the transaction by the terms of the statute is an agreement of the receiver to pay back the purchase money only on demand, *i. e.* upon the performance of a condition precedent by the buyer. The promise to return the money is not unconditional. Regarding the obligation of the seller to return the purchase money on request or on demand therefor as a contract, pure and simple, it is well settled that the condition precedent must be averred in cases where there is no obligation to pay outside of the terms of a contract which requires payment to be made only upon the happening of a specified contingency. *De Wein* v. *Osborn,* 12 Colo. 407, 21 Pac. Rep. 189. In an action upon a contract to do some act when thereto requested, a request before suit must be alleged. 4 Enc.

Pl. & Prac. p. 646, and note 2. It is elementary that in actions arising solely upon a statute the pleader must allege facts which bring his case within the terms of the statute. Id. pp. 655, 657c. The absence in a pleading of any averment of a demand, in cases where a demand is a condition precedent of recovery, is a defect which can properly be reached by demurrer. This is well settled. Id. p. 661, and cases cited in note 5. In the case at bar, if it be conceded that the answer alleges a cause of action against the plaintiff, the remaining question, as to whether such cause of action could be averred as a counterclaim in this action, could only be raised by demurrer. See *Noble Tp.* v. *Aason* (decided this term), 76 N. W. Rep. 990, citing *Bank* v. *Laughlin*, 4 N. D. 391, 61 N. W. Rep. 473. Counsel for respondents contend that the plaintiffs, by demurring to the answer, have asserted a superior right to the money in suit, and have thereby shown that no demand would be responded to by plaintiffs, if one were made, and hence, as counsel claim, plaintiffs are estopped from showing a want of demand in bar of the action upon the counterclaim. This position is obviously untenable. Plaintiffs have pleaded no facts whatever in response to the counterclaim. Nor is there aught in the demurrer to indicate that plaintiffs will not comply with a demand for the purchase money of the liquor, if such demand shall be made upon them. Respondents' counsel further claim that it appears that plaintiffs are nonresidents, and that fact ought to operate as an excuse for the nondemand of the money. We think that the fact that a demand would be inconvenient cannot in this class of cases operate to excuse the want of demand before suit. This action, as we have said, arises strictly under a statute, and the requirement of a demand in the statute, as a condition precedent of recovery, is imperative. No action will lie in this class of cases until the demand is made, unless a demand is waived. The order overruling the demurrer to the answer should be reversed, and the District Court is directed to reverse said order and enter an order sustaining said demurrer. All the judges concurring.

(77 N. W. Rep. 281.)

ELIOT MELDAHL *vs.* J. JEFF. DOBBIN AND MARTHA DOBBIN.

Opinion filed November 12, 1898.

Unrecorded Deed—Title Acquired.

An unrecorded deed, the grantor holding the full legal title, is sufficient to pass the full title to the grantee as between the parties, subject to be defeated only by a subsequent conveyance by the grantor in such unrecorded deed to one who takes in ignorance of the fact that such deed had been given; and where the grantee in such unrecorded deed conveys to a third party with full covenants, and such deed is recorded, and subsequently the grantor in the unrecorded deed conveys the same property by quitclaim to such third party, which

deed is also recorded, such party holds the full legal and record title to the property.

Tax Deed—Record—Effect.

A tax deed valid on its face, and which has been of record for more than the full time limited by law in which to bring an action to set aside or avoid such tax deed, is effective to cut off all interest under a prior tax deed on the same property.

Appeal from District Court, Barnes County; *Glaspell,* J.

Action by Eliot Meldahl against J. Jeff. Dobbin and Martha Dobbin. Judgment for defendants, and plaintiff appeals.

Affirmed.

Herbert Root, for appellant.

Winterer & Winterer, for respondents.

BARTHOLOMEW, C. J. This action was brought to recover damages on a covenant of seisin contained in a deed executed by defendants to plaintiff purporting to convey lot 4, in block 30, original plat of the City of Valley City, in Barnes county. The case was tried to the Court, and the defendants prevailed, and plaintiff brings the case here for trial de nove. We note, first, that plaintiff is in quiet and peaceable possession of the property, and has been at all times since he received his deed from defendants. No paramount or adverse title has been asserted by any one or in any manner. But it is urged that defendants were not seised of the premises when they executed the deed to the same, or at any time prior to the commencement of this action. The land was a part of the grant by Congress to the Northern Pacific Railroad Company. Subsequently the railroad platted the sectional subdivision whereon the lot is situated as a part of the original plat of said City of Valley City, and the record chain of title, barring certain tax deeds that will be mentioned hereafter, is continuous from the railroad company through various transfers to one Shannon. The next deed appearing of record is a warranty deed from one Solomon to the defendant J. Jeff. Dobbin. The deed from Shannon to Solomon is missing. But there is evidence strongly tending to show that Shannon did in fact execute and deliver to Solomon a deed for said premises, and the same was forwarded by Solomon by mail to the register of deeds of Barnes County for record. It would seem that the deed was never received. It was, of course, effectual, as between the parties, to pass the full title, subject to be defeated only by a subsequent deed from Shannon to some party who received the same in ignorance of the execution of the deed from Shannon to Solomon. When the defect in the record title was discovered, efforts were made to correct the same. But Shannon had changed his place of residence, and could not be found. At the request of Solomon, Shannon's grantor, one Barring-Gould, quit-claimed to Solomon. But of course that did not cure the defect. In the meantime Solomon died. Subsequently Shannon was found in Pennsylvania, and by deed dated October1, 1897, quit-claimed to de-

fendant J. Jeff. Dobbin. It is claimed that this deed conveyed nothing, as the evidence shows that Shannon had previously conveyed the property by warranty deed to Solomon. This is true, but the title thus conveyed to Solomon had already vested in Dobbin, thus giving him the full legal title, and the quit-claim deed from Shannon to Dobbin placed the record title in Dobbin, and thus made this legal title impregnable unless affected by the tax deeds, which we now proceed to consider.

The treasurer of Barnes County sold the lot in question for the delinquent taxes of 1881, and issued the usual certificate of sale. In 1884 a tax deed was issued upon this certificate to one Warner. So far as the record shows, Warner has never conveyed whatever interest he received under such deed. The property was again sold by the treasurer of Barnes County, and also by the treasurer of the City of Valley City, for the delinquent taxes of 1886, and certificates of sale duly issued. In October, 1889, the proper officers executed tax deeds, based upon such certificates, to one Forgy. On January 20, 1892,—the date of the deed from Solomon to Dobbin,—Forgy quit-claimed his interest under said tax deeds to J. Jeff. Dobbin. As the Forgy tax deeds were subsequent to the Warner tax deed, if either of the Forgy deeds is allowed to stand all interest under the Warner deed is cut off. Of course, the members of this Court know, as nearly every taxpayer in the state knows, that all taxes levided prior to 1886 upon lands included within the grant to the Northern Pacific Railroad Company were void because the United States had a lien upon such lands for the survey fees. See *Northern Pac. R. Co.* v. *Traill Co.*, 115 U. S. Rep. 600, 6 Sup. Ct. 201. Hence nothing passed under the Warner tax deed. But we do not base our decision upon that ground. The appellant urges that the Forgy deeds were ineffectual to cut off the Warner deed by reason of their invalidity, and evidence was introduced, subject to respondents' objection, to show such invalidity. We think this evidence ought not to be considered. The statute in force during all these transactions (section 1640, Comp. Laws) declares: "No action shall be commenced by the former owner or owners of land or by any person claiming under him or them, to recover possession of land which has been sold and conveyed by deed for nonpayment of taxes or to avoid such deed, unless such action shall be commenced within three years after the recording of such deed." The Forgy tax deed from the county was recorded January 20, 1890. The deed to appellant was dated March 2, 1894. It was then too late to avoid the tax deed. Hence the interest under the Warner deed had ceased to exist unless the Forgy deed was void on its face. We do not think it was. The tax-sale certificate was issued to the New England Investment Company. This is recited in the deed, but it is also alleged that Forgy was the legal owner of such certificate; that it was duly assigned to him by E. L. Emery, secretary. We think these allegations, taken together, must be held to mean that the certificate was assigned by the New England

Investment Company by its secretary. True, the authority of the secretary to make such assignment does not affirmatively appear, but that is not necessary. Spell. Priv. Corp. § § 193, 194; Thomp. Corp. § 4696. It follows that the respondents were well seised of said lot when they conveyed the same to appellant, and the covenant of seisin in their deed has never been even technically broken. The judgment of the District Court is the judgment of this Court, and must stand affirmed. All concur.

(77 N. W. Rep. 280.)

FRANK H. DICKINSON *vs.* ANDREW H. BURKE, *et al.*

Opinion filed November 18, 1898.

Parole Evidence—Checks—Indorsement.

To an action upon an indorsement by an indorsee of a check against his immediate indorser, it is a good defense to establish that the indorsement was made pursuant to a prior agreement, under the terms of which the indorser was freed from, and the indorsee assumed, all liability thereon, and that the indorsement was for the sole purpose of transferring title thereto to the indorsee, to enable him to collect it. *Held*, that parol evidence is admissible to prove such agreement. *Held*, further, that the effect of the admission of such testimony is not to alter or vary the written contract of indorsement, but to establish facts to defeat the enforcement of liability thereunder. *Held*, motion for new trial properly overruled.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Frank H. Dickinson against Andrew H. Burke and James Moug. There was a verdict for defendant Moug, and plaintiff appeals from an order denying a new trial.

Affirmed.

William J. Clapp, for appellant.

Benton & Bradley, for respondents.

YOUNG, J. This action was tried to a jury. Defendant Moug had a verdict. Plaintiff made a motion for a new trial, which was overruled by the lower court, and he now appeals from that order, asking in this Court a review of the errors specified as the basis of that motion. Andrew H. Burke, out of whose financial reverses this action grows, is joined as co-defendant, but makes no answer or appearance. The facts are sufficiently shown by an abridgement of the pleadings. Plaintiff alleges that on October 8, 1896, Andrew H. Burke drew his check for $405.70 upon the Marine National Bank of Duluth, payable to defendant Moug; that said Moug thereafter, and for value, indorsed and transferred said check to the plaintiff; that the same was presented, and not paid, and was duly protested. The defendant Moug, answering, admits all of these allegations, except that portion stating that the transfer of the check and indorsement thereof was for value. On the contrary, he specific-

ally denies that his indorsement was for value, and alleges that it was made for plaintiff's accommodation, and in pursuance of a prior agreement relative thereto; that this check upon which he is sued as indorser represents the proceeds of a car of defendant's grain shipped to Andrew H. Burke, then a grain commission merchant at Duluth; that such shipment was made through this plaintiff, who was then Burke's agent for soliciting shipments, not merely upon plaintiff's solicitation, but in reliance upon plaintiff's express agreement then made that he would guaranty defendant against loss in case of Burke's failure; further, that he would take the check, to be returned by Burke, as his own property, and assume the entire responsibility of its collection, and give defendant his own personal check in lieu thereof, releasing defendant from all liability thereon; further, that defendant's indorsement thereof should be merely for the purpose of transferring the title. The case was submitted to the jury upon the foregoing issues, under instructions which are not complained of, resulting in a verdict for defendant.

Appellant predicates error upon the Court's ruling in permitting defendant Moug to answer the following question over his objection: "Q. Did Mr. Dickinson state at that time the amount or about how much money he kept on hand belonging to Burke?" Also in sustaining defendant's objection to this question, asked of plaintiff: "Q. Is it the habit of farmers to come to you and have their checks cashed?" In these rulings we find no error. The answer to the first question would tend to show the financial relation then existing between plaintiff and Burke, his principal, and furnish a strong reason for or against plaintiff's alleged promise to protect defendant against loss from his shipments of grain. The last question, if answered in the negative, plainly could not avail plaintiff, and, if answered in the affirmative, would not militate in his favor, for a custom of cashing checks for farmers, even if it prevailed, would not affect or destroy the particular agreement upon which defendant relies relative to the check in question. An examination of the record satisfies us that the allegations of the answer have sustantial suport in the evidence. We must, however, in view of the objections hereafter noted, determine whether such facts constitute a defense. Plaintiff says not. To support this view, he relies upon the fact that the indorsement is a written contract, and then invokes the familiar rule that parol evidence is inadmissible to vary, contradict, or explain an agreement which has been reduced to writing, and cites numerous authorities in support thereof, including the decisions of this Court which have upheld the rule in all of its integrity. It should be observed, however, that these decisions go to the admissibility of parol testimony, and not to its effect when admitted. The record shows that all of the evidence in support of defendant's answer came in without objection. Upon the question of its admissibility, therefore, the plaintiff is concluded. Nevertheless, had the objection on that ground been made at the proper time, it should not have been sustained. The defendant does not seek

to alter, vary, or contradict his written contract of indorsement by this oral testimony. His answer specifically admits the indorsement. He merely seeks thereby to establish a state of facts which will defeat the enforcement of his liability thereunder. This he had a right to do. See Daniel, Neg. Inst. § § 720a, 721, 722. Justice Starrett, in *Breneman* v. *Furniss,* 90 Pa. St. 186, uses this language: "The defendant in the court below contended that he permitted the use of his name as payee, and indorsed the check in suit at the request of and as a matter of accommodation to the plaintiff, not only without consideration, but upon the express promise and agreement that he should incur no liability by reason of his indorsement. It was competent, as between the immediate parties to the transaction, to prove these allegations. An attempt on the part of the plaintiff to enforce payment of the check under these circumstances was making such an improper use of it as would justify proof of the agreement under which it is alleged the indorsement was procured." To the same effect in *Chaddock* v. *Vanness,* 35 N. J. Law, 517; *Hill* v. *Ely,* 5 Serg. & R. 363; also, *Dale* v. *Gear,* 38 Conn. 15, wherein Butler, C. J., after enumerating the four classes of cases wherein, "as between the original parties indorser and indoree, any relation, entecedent agreement, or state of facts from which a controlling equity arises may be pleaded and proved by parol," uses this language: "Fourthly, it may be shown that there was an equity arising from an antecedent transaction, including an agreement that the note should be taken in sole reliance on the rsponsibility of the maker, and that it was indorsed in order to transfer the title in pursuance of such agreement, and that the attempt to enforce it is a fraud;" citing *Downer* v. *Chesebrough,* 36 Conn. 39. See, also, *Hamburger* v. *Miller,* 48 Md. 317; *Ross* v. *Espy,* 66 Pa. St. 481; *Lovejoy* v. *Bank,* 23 Kan. 233; *Galceran* v. *Noble,* 66 Ga. 367; *Smith* v. *Carter,* 25 Wis. 283; *Babcock* v. *Deford,* 14 Kan. 313; *Martin* v. *Marshall* (Vt.) 13 Atl. Rep. 420; *Geneser* v. *Wissner* (Iowa) 28 N. W. Rep. 471; *Harrison* v. *McKim,* 18 Iowa 485.

Appellant, however, insists that even though the parol agreement was as alleged by the defendant, yet it was blotted out and superseded by the subsequent written indorsement. The wholesome doctrine thus urged, which is found embodied in the Revised Codes (section 3888), is not applicable to the facts as they exist in this case. There is no controversy as to the contract of indorsement. It is complete in itself, and admitted. The dispute is as to the alleged agreement preceding the shipment. It would, indeed, be a gross perversion of the doctrine relied upon to make it a means of destroying their prior contract, which the evidence shows was performed fully on the part of the defendant, and was entirely separate and distinct from the subsequent indorsement. The jury evidently found the defendant's version of the transaction to be true, namely, that plaintiff agreed, as an inducement for defendant to ship the grain, that he would hold him harmless, and that he would take Burke's checks, assuming all liability himself; further, that the

indorsement of the check was a mere incident in the fulfillment of his prior promise, and made only to transfer the title of the check to plaintiff, to enable him to transmit and collect it in the usual way. The evidence sufficiently supports that view. Finding no error, the order of the lower Court overruling the motion for a new trial is affirmed. All concur.

(77 N. W. Rep. 279.)

R. W. PEOPLES *vs.* EVEN EVENS.

Opinion filed October 29, 1898.

Contract—Relinquishment of Timber Culture Entry.

The relinquishment of a timber-culture entry, which carries with it certain valuable improvements, made for the benefit of another person, and that he might file a homestead entry thereon, all under mutual agreement, is a sufficient consideration for the latter's promise that the former might crop the land.

Statute of Frauds—Executed Contract.

A lease which is void under the statute of frauds, by reason of being for a period of more than one year, nevertheless governs the rights and relations of the parties so far as executed.

Erroneous Instructions—New Trial.

Certain instructions examined, and *held* erroneous, and a new trial properly granted.

Appeal from District Court, Walsh County; *Sauter,* J.

Action by R. W. Peoples against Even Evens to recover possession of certain crops. The opinion states the facts. Verdict for defendant. From a order granting a new trial, defendant appeals.

Affirmed.

Bosard & Bosard, for appellant.

Bangs & Guthrie, for respondent.

YOUNG, J. This is an action in claim and delivery involving the possession and ownership of certain grain grown in 1893 upon the lands described in the complaint. The defendant had a verdict at the hands of a jury, and plaintiff's motion for a new trial, based upon alleged errors in the court's instructions, was granted. From this order defendant appeals to this court. Both parties based their right to the possession of the property upon a claim of ownership. The title to the land upon which the grain in controversy was grown was still in the government. The plaintiff filed upon it a timber culture entry in 1888, and has since continued to live upon it. On April 30, 1892, however, pursuant to an arrangement with the defendant, he relinquished his entry, and on May 2, 1892, the defendant filed upon it as a homestead, both parties thereafter continuing to live upon the land, and in apparent harmony, until the present controversy arose.

The evidence on both sides is very meager and extremely unsatisfactory. Plaintiff's evidence fairly discloses that at the time he relinquished his entry, and the defendant made his filing, it was agreed between them that the plaintiff should continue in possession of the land, and, using his language, "plow and sow and reap the same as if nothing had happened;" further, that the defendant also, and at the same time, agreed to deed the land back to him after proving up on it. It further appears from his evidence that in the fall of 1892 the defendant told him to go on and plow for this crop, and that he did so; also that in the spring of 1893, in April, when he was seeding the land, a further conversation was had, at which time they had what he terms "an understanding," by which he was to put in and take off this crop, in substance and effect, so far as we can see, in no way differing from the original arrangement made at the time of the relinquishment, and possibly merely a reaffirmance or continuance of it. It is conceded that plaintiff produced and harvested the crop; also that his grain was used in seeding it, although defendant claims to have bought, and agreed to pay for, the same. The defendant's evidence, on the other hand, while it does not deny the agreements which plaintiff says were made between them, as to the possession and use of the premises, at the time the relinquishment was executed, yet squarely contradicts plaintiff's version of the conversations occurring in the fall of 1892 and spring of 1893. The defendant testifies, in effect, that at the first of these conversations the plaintiff expressed a desire to lease the land, to which request he gave no definite answer, and that at the second conversation a positive agreement was reached by which the plaintiff, after being refused a lease, was permitted to continue and put in the crop, but for customary wages for his services; in fact, a contract of hiring, which, in effect, of course, would supersede any prior negotiations, and make him the owner of the crops grown. In support of his evidence on this point defendant offered in evidence the following written instrument, admittedly executed by the plaintiff and his wife: "To Whom It May Concern: We, the undersigned, agree and confirm that we are to receive ordinary or customary pay for harrowing, drilling, and plowing per acre on the northeast quarter (N. E. ¼) of section 30, township 156, range 53 west. (Signed) R. W. Peoples, Isabella Peoples. Dated the 8th day of May, 1893."

Upon this state of facts, fairly appearing in the evidence, the case was submitted to the jury under instructions which plaintiff in his motion for a new trial urged were erroneous, and which were so held by the lower court. For the purpose of this determination, it is necessary to refer only to those portions of the charge contained in the following language: "A lease of real property, if for more than one year, has, under the statute, to be in writing, and, unless you find from the evidence that the plaintiff leased this land from the defendant by a written contract of lease, or for a period not exceeding one year by a verbal agreement, then

you must find for the defendant." Again: "An agreement to file a homestead entry upon land for the benefit of another is unlawful and void, and does not furnish any lawful consideration for any contract. Every contract must be upon a lawful and valid consideration, and unless the lease for this land, if you find there was a lease, was upon a lawful consideration, then your verdict must be in favor of the defendant."

Accepting plaintiff's version of the transaction as true, it is clear that he, in return for the surrender of his entry to the defendant, received from him two promises to the enforcement of which the law would not lend its sanction, namely, the promise to deed back, and the promise of the use of the land,—the first, because of the unlawful nature of the promise itself; the second, because it seems counter to the statute of frauds, amounting, as it does, to a lease for a period of more than one year. Plaintiff was therefore powerless to enforce the performance of either promise. But, suppose the defendant had voluntarily deeded the land to the plaintiff pursuant to his promise, would a court lend its assistance to him to get back that which he has conveyed under his own fraudulent and unlawful arrangement? Clearly not. Likewise the agreement that plaintiff might continue to possess and crop the land, if made, while not enforceable if resisted by proper steps and in a timely manner, yet, so far as it was voluntarily executed, governed and fixed the rights and relations of the parties so far as executed. Again, the plaintiff's relinquishment of his timber-culture entry, whereby the defendant was enabled to file his homestead entry, carried with it certain valuable improvements, and constituted a sufficient consideration to support defendant's promise that plaintiff might continue to crop the land. *Lindersmith* v. *Schwiso,* 17 Minn. 26 (Gil. 10). If, in fact, an agreement was made which undertook to cover the production and ownership of crops in the future,—in effect, a lease, —although repugnant to the statute of frauds as to time, yet, so far as executed, that agreement governs. *Evans* v. *Lumber Co.,* 30 Minn. 515, 16 N. W. Rep. 404; *Morrill* v. *Mackman,* 24 Mich. 279; *Laughran* v. *Smith,* 75 N. Y. 205; *Larkin* v. *Avery,* 23 Conn. 304; *Sovereign* v. *Ortman,* 47 Mich. 181, 10 N. W. Rep. 191; Bish. Cont. § 634.

After a careful examination of the evidence, we have reached the conclusion that the instructions complained of were erroneous and prejudicial, and for that reason the lower court's order granting a new trial should be affirmed. The instructions were erroneous in two particulars: First. The jury were substantially instructed that there was no consideration for the alleged agreement or lease, whereas, as just noted, plaintiff's relinquishment of his timber-culture entry, if executed in pursuance of the agreement disclosed in the evidence, constituted a sufficient consideration to uphold defendant's promise to permit plaintiff to crop the land. Second. Because the instructions given permitted a recovery by plaintiff

only upon the jury's finding that plaintiff produced the grain in question either under an oral lease for one year, or a written lease if for more than one year,—clearly excluding plaintiff's right to recover under the terms of an executed lease which as to time was within the statute of frauds.

We deem it proper to remark that this result has been reached only by construing plaintiff's testimony broadly and as to its effect. By his actual language as embodied in the record, he seems to have based his ownership of the grain in question, and right to recover the same, upon the conversation occurring in the spring of 1893, and at the same time and in express language he disclaimed having a lease. Doubtless, the instructions complained of were given under a belief that the plaintiff had by his testimony limited the basis of his right to recover to the conversation or agreement in 1893. We think, however, that we should give the plaintiff the benefit of all the facts fairly disclosed in the evidence, rather than to bind him by a mistaken interpretation of their legal effect. This evidently was the view taken by the lower court in granting a new trial. The exhibit offered in evidence by the defendant, and above set out, we do not consider conclusive against the plaintiff. It is merely evidence to be weighed by the jury in connection with plaintiff's explanation that it was executed at the defendant's request, not as an actual contract of hire covering the production of this crop, but merely as a pretense for the purpose of aiding the defendant in establishing his possession and use under his homestead entry. The writing itself lends some color to the explanation. The order granting a new trial is affirmed. All concur.

(77 N. W. Rep. 93.)

ESTHER M. CAMERON *vs.* GREAT NORTHERN RAILWAY COMPANY.

Opinion filed November 11, 1898.

Trial—Motion to Dismiss.

A motion to dismiss, made at the close of plaintiff's evidence, is tantamount to a demurrer to the evidence, and in such cases everything which the jury might reasonably infer from the evidence is to be considered as admitted. In the light of this established rule of practice, ***held***, under the evidence, that it was error to withdraw this case from the consideration of the jury.

Employers Liability—Defective Appliances.

Employers are bound to furnish reasonably safe and adequate machinery and appliances for the use of their employes; and if the employer negligently fails in the performance of this duty, and the employe is injured thereby while in the exercise of due care, the master will be liable; and when such machinery, etc., is safe and adequate when furnished, the employer is bound to exercise due care in keeping it safe, and to this end seasonable inspection and repairs thereof are required of the employer. Under the evidence in this case, ***held***, that whether these duties have been performed by the

defendant, with respect to the decedent, was a question of fact for the jury.

Assumption of Risk Question of Fact.

Held, further, that the question of whether the decedent, as an employe of defendant, assumed the risk involved in taking charge of the train in question, in the condition it was then in, was a question of fact for the jury, under the evidence.

Proximate Cause—Negligence.

Held, further, under the evidence, that it was a question for the jury to determine whether the defendant was guilty of the negligence charged in the complaint, and also whether such negligence, if shown to exist, was the proximate cause of the injury complained of.

Contributory Negligence Jury Question.

Held, further, in view of the evidence, that the question of whether any negligence of the deceased contributed to his death was a question of fact for the jury.

Presumption as to Care.

Held, in deference to the instinct of self-preservation, that, in a case where there is no eyewitness of an accident resulting in death, a person who has suffered death by a railroad accident will be presumed to have been in the exercise of due care at the time, until the contrary is made to appear by evidence.

Appealable Orders.

At the close of plaintiff's evidence, the trial court, on motion of defendant's counsel, made an order dismissing the action for failure of proof. Plaintiff served notice of appeal from said order. *Held*, on motion to dismiss the appeal, made in this Court, that said order was neither a judgment nor an appealable order, and, hence, that the attempted appeal from such order was abortive.

Judgment Irregularly Entered—Effect.

Such order was entered, without any change of its form or terms, in the judgment book of the clerk of the District Court. The order concluded as follows: "The plaintiff's action is hereby dismissed. Done in open Court this 8th day of December, 1897." *Held*, in view of the explicit language of the order dismissing the action, that while the same, considered as a judgment, is irregular and highly improper in form, it nevertheless embodies the final judicial determination of the action made by the trial court, and, being duly entered in the judgment book, is sufficient, in substance, as a judgment.

Appeal from District Court, Grand Forks County; *Glaspell*, J.

Action by Esther M. Cameron against the Great Northern Railway Company. Judgment for defendant. Plaintiff appeals.

Reversed.

Bosard & Bosard, for appellant.

It is the duty of the master not to expose his servant to extraordinary danger by putting him to work in dangerous places, or with dangerous appliances or machinery. 2 Thomp. on Neg. 972; Wood's Master and Servant, 329; Deerings Neg. 198; *Russell* v.

Mfg. Co., 77 Am. Dec. 212; *Hough* v. *Ry. Co.*, 100 U. S. 217. The master is bound to use reasonable care to keep his machinery in safe and serviceable condition, and to make seasonable inspection of its condition. *Chicago, etc., Ry. Co.* v. *Jackson*, 55 Ill. 492; *Chicago, etc., Ry. Co.* v. *Bragionier*, 11 Ill. App. 516; *Bram* v. *Ry. Co.*, 53 Ia. 395; S. C. 36 Am. Rep. 243; *Atchison Ry. Co.* v. *Holt*, 29 Kan. 149; *Cincinnati, etc., Ry. Co.* v. *McMullen*, 117 Ind. 439; *N. P. Ry. Co.* v. *Herbert*, 116 U. S. 642; *Morton* v. *Detroit Ry. Co.*, 46 N. W. Rep. 111; *Grannis* v. *Ry. Co.*, 46 N. W. Rep. 1067; *Sheedy* v. *Ry. Co.*, 37 N. W. Rep. 60; *Gates* v. *Ry. Co.*, 57 N. W. Rep. 200. The deceased may have known of the broken car step, and yet the various duties occupying his attention so have occupied his mind, that he momentarily forgot it. This is not such negligence as would bar a recovery. *Fiero* v. *Ry. Co.*, 24 N. Y. Supp. 805. It is not contributory negligence for an employe to remain in service of railroad company coupling cars over open frog after knowing that a safety block would remove its peril. *Seley* v. *Ry. Co.*, 23 Pac. Rep. 751; *Pullman Car Co.* v. *Lack*, 3 N. E. Rep. 285; *Martin* v. *Ry. Co.*, 29 Pac. Rep. 645; *Kansas City, etc., Ry. Co.* v. *Flynn*, 18 A. & E. Ry. Cas. 23; *Keen* v. *Ry. Co.*, 128 U. S. 91; 2 Thomp. Neg. 1070; *Parker* v. *Ry. Co.*, 6 A. & E. Ry. Cases 731. The question of contributory negligence was for the jury. *Highland* v. *Ry. Co.*, 5 A. & E. Ry. Cases 719; *Wright* v. *Ry. Co.*, 5 A. & E. Ry. Cases 560; 2 Jaggard on Torts 1073; *Simonds* v. *City*, 67 N. W. Rep. 40. Mere knowledge of the defect did not charge Cameron with assumption of the risk. *Mahoney* v. *Dore*, 30 N. E. Rep. 366; *Cook* v. *Ry. Co.*, 34 Minn. 45; *Russell* v. *Ry. Co.*, 32 Minn. 233. The law presumes that a person who has suffered death by railroad accident, was at the time of the accident in the exercise of due care. *Kansas City, etc., Ry. Co.*, v. *Flynn*, 18 Am. & Eng. Ry Cases 23; *Adams* v. *Co.*, 41 Am. & Eng. Ry. Cases 414. There is no presumption that Cameron had notice of defective condition of car, because it might have been discovered by inspection. *Cincinnati, etc., Ry. Co.* v. *McMullen*, 117 Ind. 439. Where the evidence conflicts or is capable of different interpretations it is the jury's province to pass upon it. *Belton* v. *Baxter*, 58 N. Y. 411; *Hart* v. *Hudson, etc., Co.*, 80 N. Y. 622; *Connor* v. *Ry. Co.*, 4 N. E. Rep. 441; *Cleveland Ry. Co.* v. *Crawford*, 24 Ohio St. 631; *Robertson* v. *Ry. Co.*, 35 N. E. Rep. 775; *Emery* v. *Ry. Co.*, 9 S. E. Rep. 139; *Spaulding* v. *Ry. Co.*, 67 N. W. Rep. 227; *Rolseth* v. *Smith*, 35 N. W. Rep. 565; *Creamy* v. *Long Island R. Co.*, 5 N. E. Rep. 425; *Kellogg* v. *Ry. Co.*, 79 N. Y. 72; *Lee* v. *Gas Co.*, 98 N. Y. 115; *Sturry* v. *Ry. Co.*, 10 N. E. Rep. 128; *Whittaker* v. *Canal Co.*, 27 N. E. Rep. 1042; *Galvin* v. *Mayer*, 19 N. E. Rep. 675. Contributory negligence is seldom a question of law. *O'Brien* v. *McGlinchy*, 68 Me. 552; *Brown* v. *Ry. Co.*, 58 Me. 384; *Sleeper* v. *Ry. Co.*, 58 N. H. 520; *Elwell* v. *Hacker*, 30 Atl. Rep. 64; *Nugent* v. *Ry. Co.*, 12 Atl. Rep. 797. It was error in this case for

the Court to direct verdict for defendant, there being no eye witness to the accident and no affirmative evidence of negligence on the part of deceased. *Galvin* v. *Mayor,* 19 N. E. Rep. 675; *Rolseth* v. *Smith,* 35 N. W. Rep. 565. Where the proof is not convincing, and the question of contributory negligence is one which must be arrived at from inference concerning which reasonable men may honestly differ the question is for the jury. *Richmond, etc., Ry. Co.* v. *Powers,* 149 U. S. 443; *Omaha Street Ry. Co.,* v. *Martin,* 66 N. W.Rep. 1007; *Russell* v. *Dillworth,* 2 Atl. Rep. 355; *Baltimore, etc., Ry. Co.* v. *Meyers,* 62 Fed Rep. 367; *N. P. Ry. Co.* v. *Austin,* 64 Fed. Rep. 211; *Kellogg* v. *Ry. Co.,* 79 N. Y. 76; *Hanks* v. *Ry. Co.,* 18 N. E. Rep. 218.

W. E. Dodge and *Burke Corbet,* for respondent.

There was no judgment entered below from which an appeal could be taken, and no appeal was attempted from the order of dismissal. Sec. 5479 Rev. Codes; Secs. 5480, 5488, subd. 2, § 5489, Rev. Codes. A final judgment is without force until entered in the judgment book. In re Weber, 4 N. D. 119, 59 N. W. Rep. 523; *Locke* v. *Hubbard,* 9 S. D. 364, 69 N. W. Rep. 588. It may fairly be presumed that a servant knows the condition of machinery and appliances which he has constant opportunity to inspect and which his regular duties bring under his notice. 1 Shear. & R. on Neg. 216; *Railroad Co.* v. *Marker,* 41 Ark. 542; *Sheets* v. *Sheldon,* 103 N. Y. 667; *Brossman* v. *Ry. Co.,* 113 Pa. St. 490; *Houston Ry. Co.* v. *McNamara,* 59 Tex. 255. The evidence does not disclose to what cause death is attributable. If it is as reasonable to believe that the accident happened as the result of some other cause than that assigned there can be no recovery. The question cannot be left to conjecture. *Philadelphia, etc., Ry. Co.* v. *Schertle,* 2 Am. & Eng. R. Cases 158; *Orth* v. *Ry. Co.,* 47 Minn. 384; Bailey's Master's Liability 503, 508; *Koslowski* v. *Thayer,* 66 Minn. 150; *Moore* v. *Ry. Co.,* 67 Minn. 396. When liability depends upon carelessness or fault of a person or his agents, the right of recovery depends upon the same being clearly shown by competent evidence. *Sorenson* v. *Menasha P. & P. Co.,* 56 Wis. 338, 14 N. W. Rep. 446. The duty of plaintiff's intestate, a conductor of experience, was to inspect the train and the conditions relative to the removal of the steps. Forwarding the car to the end of his run was not unusual or hazardous employment, such hazard and risk he accepted with his employment. *Puffer* v. *Ry. Co.,* 68 N. W. Rep. 39; *Clark* v. *Ry. Co.,* 28 Minn. 128; *Kelly* v. *Ry. Co.,* 35 Ill. 106; *Gibson* v. *Ry. Co.,* 63 N. Y. 449; *Haden* v. *Mfg. Co.,* 29 Conn. 548; *Devitt* v. *Ry. Co.,* 50 Mo. 302; *Baylor* v. *Ry. Co.,* 40 N. J. L. 23; Woods Master and Servant 680, 718; Patterson Ry. Accdt. Law 344.

WALLIN, J. This action is brought by the widow of Edward James Cameron to recover damages for the alleged negligence of the defendant in causing the death of the said Cameron. The

action was tried to a jury, and at the close of the plaintiff's evidence the case was withdrawn from the consideration of the jury, and the action dismissed. This ruling is assigned as error in this Court, and the only question that need be determined here is whether such ruling was error.

There is little dispute in the evidence as to the existence of the determining facts of the case. The record shows that the decedent was at the time of his death a passenger train conductor in defendant's employ; that on the 17th day of November, 1894, he was killed by falling or being thrown from the passenger train of the defendant then in his charge as conductor; that such accident occurred in the county of Grand Forks, N. D., about midway between the station of Arvilla and the next station, situated about seven miles east of Arvilla, and named "Emerado." The train was east bound, and was the regular Pacific passenger train, consisting of nine cars, and running between Seattle, Wash., and St. Paul, Minn. The accident occurred between 6:43 and 6:52 p. m., and at a time when the train was running at a high rate of speed. The train reached Grand Forks at 7:25 p. m., and there the conductor was missed; and, on being searched for, his body was found at the place above indicated. The evidence shows that the right shoulder of the deceased was crushed down, and one of his arms broken. His skull was also broken. A physician testified that death resulted immediately, or almost immediately, as a consequence of said injuries. The deceased had taken charge of the train at Minot, N. D. It appears that the deceased was seen alive just after the train passed Arvilla; and there is evidence tending to show that a very few minutes before the accident the deceased was seen in the rear sleeper, the last car of the train, passing through the car towards the rear end of the car, but no witness testifies to having seen him pass out of the back door of the car and onto the rear platform at that time, or at all that day. It appears that the train in question, while backing into the station at Great Falls, Mont., met with an accident whereby the steps leading to the platform were broken, which steps were located at the rear end, and on the left and north side, of the last car in the train, which car was a sleeper, and was the same car on which the deceased, so far as shown by the evidence, was last seen alive. The rear platform of this sleeper was about five feet wide across the car, and about three feet the other way. Counsel, in discussing the case in this Court, have assumed that the rear end of a platform on the last car of a passenger train is supposed to be guarded by a chain, which is so made that it can be fastened and unfastened; but the evidence in this case fails to show whether there was or was not such a chain on this car. After the steps had been broken, and before the train left Great Falls, Mont., the broken steps were removed by the employes of the defendant, and the bolts which fastened the steps were laid on the rear platform of the sleeper; and the car came east in the train, and continued to be the rear

car, and said steps were absent and not on the car at any time until after it reached Grand Forks, N. D. The evidence fails to disclose whether the defendant has a car shop or other facilities for the repair of its cars at any point on its line between Great Falls, Mont., and Grand Forks, N. D.; but the evidence tends to show that similar accidents to car steps had occurred with some frequency in the mountains between Seattle, Wash., and Helena, Mont., during the years 1893 and 1894, and that, when steps were so broken and removed at any point between the Pacific Coast and St. Paul, it was not the custom of defendant to take out the car for repairs while in transit. It is claimed that the deceased, having been in defendant's employ for some years prior to the accident, is chargeable with knowledge of this custom of the defendant in this particular, and voluntarily assumed any risk which such custom involved. Reverting to the rear platform in question, it appears that there was an iron gate, some 3½ feet high, which, when closed, shut in the platform on the sides, and prevented ingress or egress to the sleeper by way of the steps leading to the platform. These gates swing from the car to the railing,—swing out to close, and in to open. The hinge makes the fastening for the gate. There is one hinge on the gate, and one on the car, and also another hinge halfway between. As the gate closes, the hinge straightens out, and as it is opened the hinge closes at an angle; and it is not possible, without raising the hinge, to open the gate. But it appears that these gates may, when fastened, be opened by applying the hands to the gate, and are ordinarily so opened and shut. The gates, when closed, are inside the steps, so that a person on the platform could not pass down the steps without first opening a gate. A passenger from Helena, who occupied the rear sleeper, testified that he was on the rear platform between 3 and 4 o'clock in the afternoon of the day of the accident, and while there noticed the absence of the car steps, and also that the gates were at that time closed. This passenger found the back door of the car unlocked when he pased out upon the rear platform. This witness was on this car, and heard the noise caused by breaking the steps, and learned while at Great Falls that the steps were broken. It is not claimed that the gate on the north side of the rear platform was, after the steps were removed, securely fastened, so as to wholly prevent its being used or opened while in transit to St. Paul. The theory of the complaint is that after the steps were removed the car was defective, inadequate, and unsafe as a car, to the knowledge of the defendant, and might have been made safe by the defendant by the use of ordinary care, viz. by securely fastening the north gate on said rear platform, which gate, the complaint alleges, "could have easily and conveniently been rended safe, which fact was well known to the defendant, but the defendant neglected to cause said gate to be closed and fastened." The complaint avers

that the deceased was unaware of the unsafe and defective condition of the car, and that while he was in the discharge of his duties as conductor of said train, and by reason of the alleged unsafe and defective condition of said car, and without negligence or fault on his part, he was cast upon the ground, and there killed. The body of the decedent was found on the north side of the track of the railroad, and in the ditch. Several articles belonging to him, including his lantern, ticket punch, certain change and pocket pieces, were also found near the body. These articles were scattered along the ground, west of the body, for a distance of 10 or 15 feet therefrom, and all of the same were found on the north side of the railroad track. The ticket punch was found some 4 or 5 feet north of the track. There was no eyewitness of the accident, and no witness attempts to testify directly as to how the deceased fell or was thrown from the train.

In this state of the evidence, counsel for the appellant insists that it was error to take the case from the jury. In disposing of this assignment of error, it is well settled that conflicts in the evidence, upon material points must be disregarded, and the whole evidence is to be construed most favorably to the party against whom the ruling is made. The defendant's motion to dismiss was, in effect, a demurrer to the plaintiff's evidence, and upon such demurrer the Supreme Court of the United States declares the rule as follows: "On a demurrer to evidence the Court is substituted in place of the jury as judges of the facts, and everything which the jury might reasonably infer from the evidence is to be considered as admitted." *Bank* v. *Smith*, 11 Wheat. 171. This Court has had frequent occasion to apply this well-settled rule of practice, and has often emphasized the importance of exercising great caution in taking a case from the jury. See *McRea* v. *Bank*, 6 N. D. 353, 70 N. W. Rep. 813; *Vickery* v. *Burton*, 6 N. D. 253, 69 N. W. Rep. 193. The test is whether there is any competent evidence in the case reasonably tending to sustain the cause of action alleged; and, if the evidence is such that intelligent men may fairly differ in their conclusions thereon upon any of the essential facts of the case, it is error to withdraw the evidence from the consideration of the jury. This case must be governed by this rule.

It is well settled that the master must furnish the servant with reasonably safe and suitable machinery and appliances, and if the master fails in this duty, and the servant is injured thereby while in the exercise of due care, the master will be liable for such injury. The master is bound to observe all the care which prudence and the exigency of the situation require, with respect to furnishing instrumentalities adequately safe for the use of the servant, and, when such instrumentalities are furnished, the master is required, further, to exercise due care in keeping the same safe and serviceable; and, with this end in view, the master is bound to make seasonable inspection of the condition of the instrumentalities furnished for the use of the servant. These rules are familiar, and are

so frequently reiterated by the Courts that authority in their support is unnecessary; but see 2 Thomp. Neg. p. 972; Wood, Mast. & S. § 329; *Brann* v. *Railroad Co.*, 53 Ia. 595, 6 N. W. Rep. 5; *Railroad Co.* v. *Herbert*, 116 U. S. 642, 6 Sup Ct. 590; *Railroad Co.* v. *Jackson*, 55 Ill. 492; *Hough* v. *Railroad Co.*, 100 U. S. 213; *Buzzell* v. *Mfg. Co.*, 77 Am. Dec. 212, and notes at end of the case. These authorities show also that the deceased was not a fellow servant with other servants in the defendant's employ, whose duty it was to provide and inspect the cars furnished for the use of conductors, in the sense that the defendant would not be liable for the neglect of such other servants in furnishing adequate cars and appliances to the deceased for use in the defendant's railroad operations.

In the light of these authorities, the inquiry is presented whether the rear sleeper in question, with the steps thereof removed as before explained, was, when delivered to the deceased, in Minot, in a safe condition, and especially was it a safe and adequate instrumentality, with reference to its use by the deceased as a train conductor. In view of the fact that the evidence fails to show that the defendant had facilities for repairing its cars broken in transit elsewhere than at the termini of its line, St. Paul and Seattle, we should be inclined to hold that it was not negligence on defendant's part to send the sleeper in question to St. Paul, as a part of the train to which it was attached when broken. But the ulterior inquiry is whether, after the defective condition of the car became known to the defendant, and the defendant's employes had detached the steps as they did at Great Falls, Mont., it was an act of negligence to deliver the car to the deceased in its broken condition, without first securing the gate on the north side of the rear platform in such a manner as to wholly prevent the egress of persons within the sleeper through said gate. This could have been easily and quickly accomplished by the defendant's employes who removed the steps. It was not done, and we are of the opinion that it was a question of fact whether the omission constituted an act of negligence on defendant's part.

But counsel for the respondent further contends—and this most strenuously—that, if defendant's negligence be conceded, the evidence in the case fails to show that the death of the decedent resulted from such negligence. In other words, counsel claims that the negligence complained of does not appear to have been the proximate cause of the injury alleged, in this: that the evidence, as counsel claims, does not show that the deceased was killed by falling through the opening made by removing the steps leading to the platform in question. Upon this point we quote from the brief of the respondent's counsel: "No reason is assigned or shown by the evidence for his visiting that platform, and, having once reached it, he may have been engaged in reaching under the end of the platform to adjust the air valves. He may have fallen or been thrown off the rear end of the platform, either over or under the

chain guard, or, in the absence of a chain guard, may have been cast from the platform by tramps engaged in stealing a ride, or may have deliberately reached over, unfastened the gate, opened it, and stepped out upon the tracks. The evidence does not disclose to which of these causes his death was attributable, and the rule is well settled that, if it is as reasonable to believe that the accident may have happened as the result of some other cause than that assigned, there can be no recovery. The question must not be left to mere conjecture.'" In support of the rule of law contended for, counsel cites among others, the case of *Koslowski* v. *Thayer*, 66 Minn. 150, 68 N. W. Rep. 973; also *Moore* v. *Railway Co.*, 67 Minn. 394, 69 N. W. Rep. 1103, and other authority. The cases cited are not similar, as to their facts, to the case at bar, but the rule of law as announced in both of the cases is elementary; and in the case of *Koslowski* v. *Thayer* the Court said in the syllabus "that there was no evidence furnishing a reasonable basis for the conclusion that the negligence of the defendants was the proximate cause of the death of plaintiff's intestate." And in *Moore* v. *Railway Co.* the Court gave the same reason for reversing the judgment entered in favor of the plaintiff. Both cases support the rule that a verdict must not rest on mere conjecture, and that, where the evidence is such that "it is as reasonable to believe that the accident may have happened as the result of some other cause than that assigned, there can be no recovery." Applying this rule, the question arises whether there is evidence in this case, either direct or circumstantial, upon which the jury could have reasonably inferred that the deceased lost his life in the manner alleged in the complaint; and the crucial test is whether intelligent and honest men, after carefully weighing the evidence, might fairly differ upon this question. We are of the opinion that the evidence and conceded facts in this record furnish a legitimate basis for the inference that the deceased was killed in the manner charged in the complaint, and that this inference has a stronger support in the evidence than either the conjectural theories of the accident which have occurred to us, or those which have been suggested by the learned and ingenious counsel for the respondent, and hereinbefore mentioned; and we feel very confident that, after considering the testimony, intelligent and honest jurors may have fairly differed upon the question whether the deceased did or did not lose his life in the manner alleged. It may be conceded—and that without violating physical laws, or running counter to direct evidence—that there is a naked possibility that the deceased lost his life either by falling or being thrown off the end of the rear platform, or by falling or being thrown from the steps leading out of the car from the south side of the platform; but, as we have already said, these conjectural modes of death have, in our opinion, less support in the evidence than the manner of death alleged in the complaint. The skull of the deceased was found to be broken, and the expert testimony tends to show that he died from the effects of the accident immediately, or nearly so. This being the evidence, it

would, we think, be incredible to suppose that the deceased, after falling from the train on the south side thereof, should have passed to the north side of the track, where the body was found, and carried with him his several belongings which were found near the body, and also on the north side of the track. And it is only a little less incredible, in our opinion, under the evidence, to suppose that, after being hurled to sudden death from the end of the platform, the deceased, taking all of said belongings with him, made his way to the north side of the track, and that not a single article belonging to the decedent was left behind upon either the center or south side of the track. In our judgment, neither of these hypotheses finds much support in the evidence; and, on the other hand, the evidence, in our judgment, tends more particularly to support the theory of the accident pleaded by the plaintiff.

But counsel again contends that the conceded facts in the case tend to show that the negligence of the deceased, if he lost his life as alleged, contributed to the accident, and was itself the proximate cause thereof. If this contention can be sustained upon the record, the plaintiff cannot recover. But it should not be overlooked that negligence is a question of pure fact, and never becomes a question of law for the Courts, unless the facts, and all legitimate inferences therefrom, are conclusively established. In this case, the Court having reached the conclusion that the evidence raises at least a probability that the deceased was killed in the manner alleged, we are next to inquire whether, at the time the deceased passed through the north gate, and onto the ground, to his death, he knew, or should have known, that the steps were removed. Under the evidence, we think the inference is legitimate that the decedent did not in fact know that the steps were removed and not in place when he passed out through that opening. The train was moving rapidly, and was then midway between stations. Under these circumstances, to have opened the door, even to look out ahead, would have been an act of great imprudence, if the decedent knew of the defective condition in question. We could not indulge such a supposition, unless the evidence and all the circumstances clearly indicated the existence of such facts as tend to show that the deceased did know of the defective condition of the car. But there is a presumption of law which furnishes a rule appliable to a case like this. The law, out of regard to the instinct of self-preservation, will presume, prima facie, that a person who has suffered death by a railroad accident was at the time of the accident in the exercise of due care; and this presumption is not overthrown by the mere fact of the injury. *Flynn* v. *Railroad Co.*, 78 Mo. 195. See, also, *Adams* v. *Iron Cliffs Co.* (Mich.) 44 N. W. Rep. 270. In the absence, therefore, of an eye witness to the accident, it is the duty of the Court to assume, unless it is shown to the contrary, that at the time of the accident the party injured was in the exercise of due care. Plaintiff being entitled, under the authorities, to invoke in her aid the legal presumption of due care on the part of the deceased,

the defendant, therefore, has the burden to overthrow such presumption by evidence sufficient to do so. This burden is not sustained by the production of evidence which leaves the question of contributory negligence in doubt. If, under the evidence, reasonable men may honestly differ, the ultimate question is one of fact for the jury. As we have shown, the evidence as to the manner of the accident tends to show that the decedent did not in fact know of the absence of the car steps. The question, therefore, on this branch, is, was he bound to know the defective condition? Upon this feature we are confident that the question was one of fact, which should have been submitted to the jury, with instructions as to the prima facie presumption already referred to as applicable to cases of this kind. We are unable to see that this presumption has been overthrown by the evidence, or by the fact that the decedent was in charge of the train, as conductor. It does not appear from the evidence that the conductor actually visited this platform at any time during the day in question prior to the time he was killed; nor does it clearly appear that a train conductor would necessarily visit that particular platform in the discharge of his duties. We are clear that a Court ought not to assume, as a mere question of law—First, that a conductor of such a train must necessarily go upon such platform in the discharge of his duties; and, secondly, being there, must necessarily have observed the absence of the car steps. The steps were not removed while the deceased had charge of the train. The car in question had been delivered to the care of the deceased as a part of a regular through passenger train. It would seem that the decedent would be justified in assuming, under the circumstances, until it appears that he actually discovered the defect in question, that the entire train was safe and adequate as a through train for the conveyance of passengers. A sleeping-car porter, who was on duty on the train throughout the entire trip, testified: "I do not know when the steps were removed from the rear end of the sleeper. Know nothing about it particularly. I knew they were off when we landed at Havre. Made no examination of the platform at the time." It is well known that the duty of a sleeping-car porter is to assist passengers on and off sleeping cars, and yet this porter seemed to have been unaware of the absence of the steps until long after their removal; and, when their absence was discovered, he apparently paid little attention to the fact. This indifference of the porter may perhaps be explained further by another fact. The porter testified: "My instructions are to lock our rear doors, approaching all important stations. This is practiced at Grand Forks and Larimore. And we unlock the doors upon getting away from stations. The practice is to lock the rear door of the rear car, and the forward door of the forward car. One man has to go to the office to get his documents, and that is so one man can watch two cars, leaving the two doors open together." This evidence, we think, suggests a pertinent question of fact, *i. e.* whether the train conductor was aware of the custom of locking the rear door of a

rear sleeper on approaching important stations, and, if so, whether it was an act of negligence on his part, under the circumstances, not to inspect said platform, and discover the defects in question. At least, we are clear that intelligent men might reasonably differ upon this feature of the alleged negligence of the decedent. The rules of law governing the question of contributory negligence have long since emerged from the realm of doubt. Primarily the question is one of pure fact, and where the evidence is either conflicting or fairly susceptible of different interpretations, or the inference from the evidence doubtful, the question is for the jury. The rule is the same where the evidence is undisputed, if different inferences therefrom may be fairly deduced by intelligent minds. We cite only a few cases from the mass of authority sustaining these propositions: *Railroad Co.* v. *Tobriner*, 147 U. S. 571, 13 Sup. Ct. 557; *Dunlap* v. *Railroad Co.* 130 U. S. 653, 9 Sup. Ct. 647; *Nugent* v. *Railroad Co.*, 80 Me. 62, 12 Atl. Rep. 797; *Payne* v. *Railroad Co.*, 83 N. Y. 572; *Adams* v. *Iron Cliffs Co.* (Mich.) 44 N. W. Rep. 270; *Galvin* v. *Mayor, etc.* (N. Y. App.) 19 N. E. Rep. 675.

A single question—one of practice—remains to be considered. The record shows that at the close of the plaintiff's evidence, and upon motion of the defendant's counsel, the trial court made an order dismissing the action. This order, after reciting the grounds upon which it is made, proceeds as follows: "Which motion, after being duly considered by the Court, is allowed, and the plaintiff's action is hereby dismissed. Done in open court this 8th day of December, 1897." This record shows that the clerk of the District Court entered this order in the judgment book, and it appears that the order was filed with said clerk on August 5, 1898. The notice of appeal, served August 8, 1898, is in the following language: "Please take notice that the plaintiff in the above-entitled action hereby appeals to the Supreme Court of this state from the judgment of dismissal made in said action on the 8th day of December, 1897, and entered in the office of the clerk of the District Court on the 5th day of August, 1898, in favor of the defendant and against the plaintiff, and from the whole thereof." This order of dismissal, when made, was merely an interlocutory order, and its character as such is not affected by being misdescribed as a judgment in the notice of appeal. Under the statute governing appeals in this state, as repeatedly construed by this Court, such orders are nonappealable orders. See In re Weber, 4 N. D. 119, 59 N. W. Rep. 523; *Field* v. *Elevator Co.*, 5 N. D. 400, 67 N. W. Rep. 147. See, to the same effect, *Locke* v. *Hubbard* (S. D.) 69 N. W. Rep. 588. But the notice of appeal also states that the plaintiff appeals from a judgment of dismissal in this action which was entered by the clerk of the District Court on the 5th day of August, 1898. An inspection of said judgment (a copy thereof being in the record) discloses that the same is a copy of the Court's order of dismissal, and nothing different or additional

thereto is contained in the same. The question is therefore presented whether this constitutes a judgment, within the meaning of the law. We are constrained to hold that it does. It embraces the disposition made of the case by the court below, and that disposition is incorporated in the judgment book. The language of the judgment is, "The plaintiff's action is hereby dismissed." This is explicit, and it is found written in the judgment book kept in the office of the clerk of the District Court. It is needless to say that this mode of entering judgment upon an order of dismissal is very slipshop, and not to be encouraged. Nor must we be understood as holding that an order simply directing that the action be dismissed would, if entered in the judgment book, operate as a judgment of dismissal. Upon this question no opinion is expressed. For reasons already advanced the judgment is reversed, and a new trial is ordered. All the judges concurring.

(77 N. W. Rep. 1016.)

THE UNITED STATES SAVINGS AND LOAN COMPANY *vs.* SANFORD A. SHAIN, *et al.*

Opinion filed November 14, 1898.

Conflict of Laws—Contract as to Which Law Shall Control.

Where in a money-loaning transaction, the lender and the borrower reside in different states, it is competent for them to agree that the transaction shall be governed by the laws of either state.

Presumption of Validity.

Where, under such conditions, the transaction would be valid and binding under the laws of one state, and invalid under the laws of the other, the law will presume, in the absence of stipulations, that the parties contracted with reference to the laws of that state where their contract will be upheld.

Foreign Corporation May Enforce Contract in this State.

Where a foreign building and loan association advanced money to a member of said association resident in this state, who received the same, and executed a note for the amount, and a mortgage upon real estate to secure the same, such note and mortgage can be enforced in the courts of this state, notwithstanding the fact that said association had not complied with the statutes prescribing the terms upon which foreign corporations might do business in this jurisdiction. Mill Co. v. Bartlett, 54 N. W. Rep. 544, 3 N. D. 138, followed.

Stock Payments Not Applied to Wiping Out Debt for Money Borrowed.

Where a party subscribes for shares of stock in a building and loan association, and agrees to pay therefor by paying certain monthly installments upon each share of stock until the same reaches maturity or par, and where such party subsequently borrows money from such association, with the understanding that the same may be paid by a surrender and cancellation of his stock when it reaches

maturity, while the stock of such party shares in the profits of the association he cannot claim to have his monthly payments upon stock applied, as made, in reduction of the amount so borrowed.

Violation of Charter by Association Will Not be Presumed.

Courts cannot presume that a building and loan association violated its charter provisions, as well as the provisions of the statute under which it was created, by refusing to allow its members to secure its funds by competitive bidding for the same, without some competent evidence of such a course.

Usury—Premium Bid—Estoppel.

While a by-law of a building and loan association, which fixes a minimum premium below which bids will not be considered, may render a transaction usurious as to one who was forced, by reason of the by-law, to bid a larger premium than he otherwise would have been required to pay, yet, where one voluntarily bids a premium greatly in excess of that required by the by-law, he cannot be heard to complain of the obnoxious by-law.

Appeal from District Court, Stutsman County; *Fisk*, J.

Action by the United States Savings and Loan Company against Sanford A. Shain and others. Judgment for defendants. Plaintiff appeals.

Reversed.

Benton & Bradley, for appellant.

The right of a corporation of another state to make contracts in this state is unquestionable, where not contrary to the known policy of the state or injurious to its interests. *Bank* v. *Earl*, 13 Pet. 519-588. Minnesota corporations are permitted to establish offices without the limits of that state for the transaction of building and loan business. Sec. 116, Ch. 34, Minn. Stats. 1878. And there is nothing in the laws of this state, indicating a policy refusing to recognize the right of such foreign corporations to make contracts here, excepting the limitation imposed. Sections 3190-3192 Comp. Laws; Ch. 40 and 41 Laws 1889. The prohibition of certain specified contracts by corporations in these laws is by necessary implication an admission that other contracts may be made by foreign corporations and that no legislative permission is necessary to give them validity. *Bank* v. *Earl*, 13 Pet. 519; *Conn. Mut. Life Ins. Co.* v. *Cross*, 18 Wis. 109; *New York, etc., Co.* v. *Oil Co.*, 3 Duer. 648; *Munford* v. *Ins. Co.*, 4 N. Y. 463; *Brill* v. *Pool*, 12 N. Y. 495; *Blair* v. *Ins. Co.*, 47 Am. Dec. 129. Neither its charter nor the laws of the state creating it, places any restraint upon the association as to making contracts in a foreign state. The right to so contract is presumed. Thomp. on Corp. § 7883; *Wood Hydraulic Co.* v. *King*, 45 Ga. 34; *Boulware* v. *Davis*, 90 Ala. 207; *Chautauqua County Bank* v. *Risley*, 19 N. Y. 381. And the right to so contract here is presumed unless repugnant to the policy of our laws. Thomp. on Corp. § 7884; *Aldward* v. *Holmes*, 10 Abb. N. C. 96; *Ducat* v. *Chicago*, 95 Am. Dec. 529. The con-

tract of plaintiff is valid and enforcible notwithstanding its failure to comply with the provisions of § 2, Ch. 41, Laws 1889. *Washburn Mill Co.* v. *Bartlett,* 3 N. D. 138. A court of equity will not cancel the notes and mortgage given a building and loan association, because the association did not comply with the statute prescribing terms upon which foreign corporations may do business within the state, unless the mortgagor seeking the relief pays back the amount he has actually received. *New York National B. & L. Ass'n* v. *Cannon,* 41 S. W. Rep. 1054; Story Eq. Jur. § 301; *Sporrer* v. *Eifler,* 1 Heisk. 636; *Bank* v. *Windmill Co.,* 34 S. W. Rep. 516, S. C. 96 Tenn. 367. It was competent for the parties to stipulate in their contract, that it was made with reference to and under the laws of the State of Minnesota. *Equitable B. & L. Ass'n* v. *Hoffman,* 27 S. E. Rep. 692; *Turner* v. *Ass'n,* 27 S. E. Rep. 947; *Caesar* v. *Cappell,* 83 Fed. Rep. 403.

Ormsby McHarg, for respondent.

A foreign building and loan association cannot do business in this state, whereby it contracts to receive usurious interest, and claim protection under the laws of this state. *Falls* v. *U. S. Sav. & L. Co.,* 13 So. Rep. 25; *Link* v. *Ass'n,* 89 Pa. 15; *Willard* v. *Ass'n,* 45 Md. 546; *Kuppert* v. *Ass'n,* 30 Pa. 465; *Maine Guaranty Co.* v. *Cox,* 42 N. E. Rep. 915; *Meroney* v. *Atlanta,* 21 S. E. Rep. 924; *Randall* v. *Ass'n,* 60 N. W. Rep. 1019; *St. Joseph* v. *Thompson,* 19 Kan. 321; Endlich B'l'd'g Ass'ns, §§ 510 and 518. Plaintiff contracted to receive and did receive interest in excess of twelve per cent. This was a criminal offense. Ch. 133 Laws 1889. Thus the contract sought to be enforced here was in effect doing business in this state in violation of an express prohibition. *Bradley* v. *Armstrong,* 9 S. D. 267, 68 N. W. Rep. 733. Only building associations, incorporated under the laws of this state are exempt from the operation of the usury law. § 3 Ch. 41 Laws 1889; *Vermont L. & T. Co.* v. *Whithed,* 2 N. D. 82. The contract is governed by the law of the state wherein the land is situated. *United States Sav. & L. Co.* v. *Scott,* 34 S. W. Rep. 235; *Falls* v. *Loan Co.,* 13 So. Rep. 25; *Meroney* v. *Atlanta,* 21 S. E. Rep. 924; *Tilley* v. *Ass'n,* 52 Fed. Rep. 621; *Rowland* v. *Ass'n,* 18 S. E. Rep. 965; *Roberts* v. *Life Ins. Co.,* 24 S. E. Rep. 780; *Building & Loan Ass'n* v. *Griffin,* 39 S. W. Rep. 656. If the contract is controlled by the Minnesota statute, as contended by appellant, it is void for usury. The transaction with respondent was a loan and not exempt under the statutes of Minnesota from operation of the usury law there. *Fagin* v. *Peoples Sav. & L. Ass'n,* 55 Minn. 437 S. C. 57, N. W. Rep. 142; *Central B'l'dg Ass'n* v. *Lampson,* 60 Minn. 422, S. C. 62 N. W. Rep. 544. And this because appellant is not a mutual building and loan association. *Central B'l'd'g Ass'n* v. *Lampson,* 60 Minn. 422; *Kent* v. *Mining Co.,* 78 N. Y. 159; *Simpson* v. *Ass'n,* 41 S. W. Rep. 570; *King* v. *Association,* 48 N. E. Rep. 677; *Gibson* v. *Association,* 48 N. E. Rep. 570. The

association charged a fixed premium of 50 per cent. for an advancement or loan. The effect of this was to destroy competition, and rendered the transaction usurious. *McCauley* v. *Association*, 37 S. W. Rep. 212; Stiles Appeal, 95 Pa. St. 123; *State* v. *Greenville*, 29 Ohio St. 92; *State* v. *Association*, 35 Ohio St. 258; *Bates* v. *Ass'n*, 42 Ohio St. 655, Endlich 394, 395, 306 and 307.

BARTHOLOMEW, C. J. This is an action by the original mortgagee to foreclose a mortgage on certain real estate situate in Stutsman county. The defendants Sanford A. Shain and Julia Shain, his wife, were the original mortgagors; The defendant William Stone is the subsequent grantee of Sanford A. Shain, and took subject to the mortgage; Augusta Stone is the wife of William Stone; and S. L. Glaspell was joined as defendant as a junior lienholder. Sanford A. Shain and William Stone answer jointly, the other defendants not appearing.

The complaint alleges the incorporation of the plaintiff under the laws of the State of Minnesota, for the purpose of doing business as a building and loan association, under the name of the United States Savings, Loan & Building Company, and the subsequent change of name to the United States Savings & Loan Company. It alleges that plaintiff has fully complied with all the requirements of the laws of the Territory of Dakota and the State of North Dakota for the purpose of enabling it to do business in this jurisdiction; that on February 4, 1889, the defendant Sanford A. Shain applied to plaintiff for a loan of $1,500, agreeing to take 30 shares of stock in the plaintiff company, and continue the monthly payments thereon until said stock should mature or the loan be paid, and pay all fines and assessments against said stock, and to pay plaintiff a premium of 50 per cent. of said 30 shares, and to assign 15 shares to plaintiff as collateral to said loan; that this offer was accepted, and said Shain executed and delivered to plaintiff the following written instrument: "St. Paul, Minnesota, April 8th, 1889. For value received, after three years from date, and before nine years from date, I promise to pay to the order of the United States Savings, Loan and Building Company, at the office of its treasurer, St. Paul, or its trustee, in Minneapolis, Minn., the sum of fifteen hundred dollars, with interest at the rate of six per cent. per annum on the sum of fifteen hundred dollars, payable monthly. It is understood that this note is given for a loan obtained on thirty shares of the stock, of the said United States Savings, Loan and Building Company; and, if the maker hereof fails to make any monthly payment on said stock or to pay any installment of interest for period of six months after the same is due, then the whole amount of these notes shall at once become due and payable, but if the maker hereof shall pay all installments of interest which become due hereon, and all monthly payments and fines which become due on said stock, until said monthly payments shall have been past due for a period of six months, then, upon the surrender of said stock

to said company, this note shall be deemed to be fully paid and canceled. This note is understood to be made with reference to and under the laws of the State of Minnesota. If this note is paid before seven years from date, there shall be allowed such rebate from the premium as the board of directors of said company shall deem equitable. Premium, $1,500. Loan, $1,500." It is further alleged that, to secure compliance with said instrument in all particulars, Sanford A. Shain and wife executed and delivered to plaintiff the mortgage in question. There is a provision in the mortgage that, in case of failure to pay the monthly interest payment or the monthly payment on stock, and such default shall continue for three months, then the whole amount to become at once due and payable. These defaults are set forth, and the defendants are charged with the following amounts:

Principal of loan	$1,500 00
Monthly interest in arrears	97 50
Monthly stock installments in arrears	216 00
Fines	48 00
Making a total of	$1,861 50

Defendants are then credited with what is called the "withdrawal value" of his shares of stock, amounting to $1,018.35, leaving a balance of $843.15, for which plaintiff asks judgment and decree of foreclosure.

The answer admits plaintiff's corporate organization, but denies that it was ever organized as a building and loan association, and alleges that it was organized for the purpose of loaning money at a usurious rate of interest; denies that plaintiff was ever authorized to do business in the Territory of Dakota. It also puts in issue the application for loan, but admits the execution of the mortgage, pleads that the contract was usurious, and pleads payment in full.

The trial resulted in a decree for defendants, directing the cancellation and satisfaction of the note and mortgage in question, and the case comes to this Court for retrial.

The appellant contends that the transaction in question must be governed by, and decided under, the laws of Minnesota. Respondents insist that the laws of Dakota territory and North Dakota must control. The solution of this question, under the authorities, is perfectly clear. This was, in its essence, a money-loaning transaction. By it Sanford A. Shain borrowed $1,500 from appellant. The parties were residents of different states. It was entirely competent for them to contract under the laws of either. They expressly agreed, both in the note and mortgage, that they contracted under the laws of Minnesota, the state of which appellant was a resident. That agreement is binding. *Liverpool & G. W. Steam Co.* v. *Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469; *Security Co.* v. *McLaughlin*, 87 Ga. 1, 13 S. E. Rep. 81; *Dugen* v. *Lewis*, 79 Tex. 246, 14 S. W. Rep. 1024; *Lanier* v. *Trust Co.* (Ark.) 40

S. W. Rep. 466; *Caesar* v. *Cappell*, 83 Fed. 403; *Scudder* v. *Bank*, 91 U. S. 406; *Bigelow* v. *Burnham*, 83 Iowa, 120, 49 N. W. Rep. 104; *Smith* v. *Parsons* (Minn.) 57 N. W. Rep. 311; *Andrews* v. *Pond*, 13 Pet. 77; *Watson* v. *Lane*, 52 N. J. Law, 550, 20 Atl. 894. The fact that the loan is made on real estate does not change this rule. *Trust Co.* v. *Burton*, 74 Wis. 329, 43 N. W. Rep. 141; *Bennett* v. *Association*, 177 Pa. St. 233, 35 Atl. 684; *Association* v. *Vance* (S. C.) 27 S. E. Rep. 274; *Association* v. *Hoffman*, Id 692. The note and mortgage in this case were made payable in Minnesota. Many cases hold that such fact alone would make the contract a Minnesota contract, in the absence of contrary stipulations. As early as *Newman* v. *Kershaw*, 10 Wis. 333, it was said: "The general rule that contracts are to be governed by the law of the place of performance is too well settled to require the citation of authorities."

Again, it is conceded that, if appellant be in fact a building and loan association, this contract would not be usurious under the laws of this jurisdiction. Not that our laws as to building associations differed materially from those of Minnesota, but our laws applied only to domestic corporations, and hence appellant could not claim any protection from them, and this contract, if a Dakota contract, would, it is claimed, be usurious. Conceding this to be true, and even were the contract silent as to which forum should govern, yet, the parties being residents of different states, the law would presume that they contracted with reference to the laws of that state where the contract would be valid and enforceable. Whart. Confl. Laws, § 429; *Bigelow* v. *Burnham*, 90 Iowa, 300, 57 N. W. Rep. 865; *Bell* v. *Packard*, 69 Me. 105; *Pritchard* v. *Norton*, 106 U. S. 124, 1 Sup. Ct. 102. Under any view that presents itself, this contract must be construed according to the laws of Minnesota.

It is next urged that the note and mortgage are of no force or validity, for the reason that, at the time of making the contracts in suit, appellant was not authorized to do business in the then Territory of Dakota. It may be conceded that at that time appellant had not complied with the provisions of sections 3190, 3192, Comp. Laws, specifying what it was necessary to do in order to enable a foreign corporation to do business in the Territory of Dakota. But, upon full consideration, we held in *Mill Co.* v. *Bartlett*, 3 N. D. 138, 54 N. W. Rep. 544, that such facts did not render contracts actually made by and with such foreign corporations unenforceable and void as between the parties. It is true that, while the negotiations that finally terminated in the contract sued upon were pending, chapter 41, Laws 1889, went into effect. That chapter imposes certain further duties upon foreign building and loan associations, but the inhibition upon doing business without compliance with the law is in no manner stronger than, or different from, that contained in the cited sections of the Compiled Laws. Hence the decision in *Mill Co.* v. *Bartlett* must control this point. But is this question before us? We have held that the contract was

made under the laws of Minnesota. The note was dated in Minnesota, the note and mortgage were finally delivered and accepted in Minnesota, and the draft for the money was payable in Minnesota. Did that constitute "doing business" in the Territory of Dakota? We need not answer the question, but the well-considered case of *Caesar* v. *Capell*, 83 Fed. Rep. 403, is very instructive on this point.

We come now to a closer inspection of the contract. Sanford A. Shain had already subscribed for 30 shares of stock of the appellant corporation. The matured value of this stock would be $3,000. Its value at the time was but small. But, in consideration of receiving an advance of $1,500, Shain agreed to continue the payment of the monthly installment of 60 cents upon each share of said 30 shares of stock until the same should mature, or, in other words, reach par value. One-half of said stock (15 shares) was to be assigned absolutely to appellant as a bonus or premium for such advance. The remaining 15 shares were to be assigned as collateral to said loan or advance. When the stock matured the advance would be repaid by the absolute surrender to appellant of the shares so assigned as collateral. But as Shain might cease his installment payments on stock at any time, and thus leave appellant without any adequate security, if it depended upon the stock alone, it required Shain, in addition to the assignment of the stock, to execute the note,—or the contract which we denominate the note,—and the mortgage securing the same; Shain agreeing to pay interest upon the sum advanced at the rate of 6 per cent. per annum, payable monthly in advance, until such loan was repaid. Now, we need enter into no mathematical calculations to demonstrate what rate of interest Shain in fact paid or agreed to pay. Section 109, c. 34 Gen. St. Minn. 1878, and which was in force when this contract was made, declares that: "Such association or corporation is authorized to loan money and funds, and secure such loan by mortgage, or other security; and any premium taken by such association for the preference or priority of such loans, or for the preference or priority on any sale, or disposition of its lands," etc., "or any premium for preference or priority taken by any mutual building association, shall not be deemed interest within the meaning of any law of this state, nor shall any excess of such premium over any rate of interest permitted by the laws of this state be deemed or held, in any court of law or equity, to be usury." That statute eliminates the premium from our further consideration as an element of usury. We may remark, in passing, that the statutes of Dakota territory contained a similar provision, fully as strong, but limited to domestic corporations. See Comp. Laws, § 3171. It is urged by counsel, and has sometimes been held, that every payment on account of stock must be treated as a payment, pro tanto, of the money loaned, and the principal must be reduced by the amount of such payment, and the principal would thus grow less from month to month, until towards the end it would be reduced to a very small sum, and finally

to one month's payment; and, as the monthly interest payments remain the same (*i. e.* at the rate of 6 per cent. per annum upon the full sum of $1,500), it is claimed that the rate of interest becomes enormously usurious, amounting towards the close of the term to several hundred per cent., and it is claimed that this makes the contract not only usurious, but so harsh, exacting, and unjust that a court of equity should relieve from it. In our judgment, this view entirely excludes the fact that all money that is paid into the treasury of the corporation upon stock installments is, in theory, at least, and generally in practice, immediately advanced to other borrowing stock subscribers, at the same rate of interest, and at a large premium, thus tending at once to increase the value of the stock of the member who pays the money into the treasury, and hasten the date of its maturity, or, in other words, hasten the day when payments on account of stock subscriptions can cease. In this manner every member receives a profit upon the money he pays upon stock installments. Now, a man cannot use his money to pay his debts, and yet use it to bring a profit to himself. The two things embody a contradiction. The stockholder in a building and loan association who insists upon having his stock installment payments applied at once in reduction of the amount advanced to him must, in fairness renounce all claims to share in the profits of the association. But that is contrary to the whole theory and spirit of building and loan associations, and directly opposed to the intentions of all parties who become members. And these remarks suggest another thought, that answers respondents' contention that the payment of the large premium renders the contract harsh and oppressive. If any subscriber suffers unduly in consequence of the premium he pays, it is because his necessities are such that he is willing to pay a larger premium than other subscribers pay. If all subscribers pay the same premium, and all the money paid in be kept continually loaned, then there can be no hardship, however great the premium may be; and herein we find the causes that operated upon the legislative mind, and induced it to declare that no amount of premium paid should render the contract usurious. End. Bldg. Ass'ns, § 17, declares: "The principal aim is to provide for its members, desirous of owning homesteads, the opportunity of obtaining advancements, with facilities for gradual liquidation, not elsewhere to be obtained, which together with the mutuality of the whole plan, amply compensates for the apparent exorbitancy of the premiums and interest; keeping in constant view the interests of the investor as well as the borrower."

But it is strenuously insisted that appellant is not a building and loan association, within the provisions of the Minnesota statutes, and hence not entitled to the privileges and immunities extended to such corporations. Two cases from Minnesota are cited in this connection. The first is *Fagan* v. *Association* (Minn.) 57 N. W. Rep 142. The opinion in that case contains an intimation that the articles of association and by-laws of the association there involved rendered it simply a saving and loan association, rather than a build-

ing and loan association. What those articles and by-laws were, is not disclosed; hence we cannot say that what is there said would have any application whatever to this appellant. The point decided by that case in no manner involves the point we are now discussing. The second case is that of *Association* v. *Lampson*. (Minn.) 62 N. W. Rep. 544. In that case it is said: "The respondent, then, upon this appeal, is to be regarded as a mutual building and loan association, doing a local business; and as such it is not subject to the usury laws of this state by reason of excess of premiums contracted to be paid by its members to it, on a loan to them, over the rate of interest permitted by law." It is claimed that under that decision it is only such building and loan asociations organized under the laws of Minnesota as are engaged in "doing a local business" that are entitled to exemption from the usury laws. The Court was then dealing with an association that did only a local business, and it made its decision no broader than the case before it. No question of discrimination between building and loan associations doing business within the state only, or doing business within and without the state, was before the Court. The association there involved, and the appellant here, were organized under the same statute (section 109, c. 34, Gen. St. 1878), and section 116 of said statute clearly contemplates that such associations need not limit their business to the State of Minnesota; and we do not think the Supreme Court of that state intended to deprive an association so organized of the benefit of the usury exemption because it had advanced money to a member who resided out of the state, or to declare that such fact deprived such association of its character of a building and loan association. It appears that, some three or four years subsequent to the making of this advancement or loan, some changes were made in the articles of incorporation and in the by-laws of appellant, and something is said in argument as to the effect of these changes upon the character of appellant. But these changes in the by-laws do not appear in the abstract, and perhaps it is unnecessary. We have carefully scrutinized the articles of incorporation and by-laws as they existed when this contract was made, and also the articles of incorporation as amended. In these we find nothing to warrant the assertion that appellant is not in fact a building and loan association. It is stated that the changes in the by-laws (which do not appear in the abstract) make certain classifications in the stock which impair the feature of mutuality. Be this as it may, it is conceded that such changes in the by-laws could not change the fundamental rights of the parties under a pre-existing contract, and in this case we are simply dealing with the enforcement of such a contract.

Lastly, it is urged that when Shain made his loan the money was not put up, subject to competitive bids. The evidence does not support this assertion. We have only the fact that the offer, as made by Shain, was for a premium of 50 per cent. How many other bids there may have been for the same money does not appear. True,

it is shown that appellant made two other loans in this state, and received the same bonus or premium. But that does not prove that there was no competitive bidding. Both the statute and the by-laws of the appellant required the funds to be put up, subject to competitive bids. We cannot assume that this was not done, in the absence of all evidence on the point. It is true that one of appellant's by-laws in force when the loan was made fixed the minimum premium at 35 per cent. But it is evident that Shain was not injuriously affected by such by-law as his bid was far above the minimum thus fixed. There was nothing but his desire to secure the money that required him to make the bid he did make. He was bound to know that upon a much lower bid he could obtain the money, if no one bid higher than he did. He cannot be heard to complain of the obnoxious by-law. End. Bldg. Ass'ns, § 411, and cases cited.

It follows from what we have said that no valid defense to this action has been shown, and that apellant is entitled to a foreclosure of its said mortgage. It is the judgment of this Court that the District Court of Stutsman county set aside and vacate its judgment heretofore entered in this case, and enter judgment and decree of foreclosure in favor of appellant, as prayed in the complaint, save and except the item of $216 claimed for stock installments in arrears. Such item is not included in the note, or secured by the mortgage. *Fagan* v. *Association* (Minn.) 57 N. W. Rep. 142. Reversed. All concur.

(77 N. W. Rep. 1006.)

WM. D. HALE *vs.* ELLA CAIRNS, *et al.*

Opinion filed November 19, 1898.

Building Association—Loan to Member—Application of Payments.

A member of a building and loan association, who borrows money from the association, and bids a premium for the privilege of obtaining the loan, and executes his bond for the amount of the loan and premium, and gives a mortgage to secure the payment of such bond, and also assigns to such association his shares of stock as collateral security for such payment, is not entitled, in an action brought to foreclose such mortgage by the receiver of such association (said association being insolvent), to apply the amounts he has paid as dues upon his stock in reduction of his indebtedness.

Appeal from District Court, Cavalier County; *Sauter*, J.

Action by William D. Hale, as receiver of the American Savings & Loan Association, against Mrs. Ella Cairns and others. Judgment for defendants, and plaintiff appeals.

Reversed.

Cochrane & Corliss, for appellant.

The plaintiff may as foreign receiver maintain this action. High. on Receivers, § 241; Beach on Receivers, § 682; 6 Thomp. Corp. § 7340; *Rogers* v. *Riley*, 80 Fed. Rep. 759; *Metzner* v. *Beauer*, 98 Ind. 425; *Toronto Cent. T. Co.* v. *Ry. Co.*, 123 N. Y. 37; *Boulware* v. *Davis*, 90 Ala. 207; *Gilman* v. *Ketchman*, 84 Wis. 60; *Comstock* v. *Frederickson*, 51 Minn. 450; *Johnston* v. *Rogers*, 43 S. W. Rep. 234; *Herd* v. *City*, 42 N. J. L. 1; *Falk* v. *Jannes*, 23 Atl. Rep. 813; 2 Beach Mod. Eq. Pr. § 747; 21 Am. & Eng. Enc. L. 240. The association having assigned the bond and mortgage to plaintiff, he can sue as owner. High on Rec. § 244; *Graydon* v. *Church*, 7 Mich. 36; *Smith* v. *Ry. Co.*, 23 Wis. 267, 270. Even without a statute to that effect the charging of a premium will not render a transaction like the one at bar usurious. 4 Am. & Eng. Enc. L. (2nd Ed.) 1055; *Reeve* v. *Ass'n*, 19 S. W. Rep. 917; *Abbott* v. *Ass'n*, 23 S. W. Rep. 629; *Setliff* v. *Ass'n*, 39 S. W. Rep. 546; *Bank* v. *Cook*, 60 Ark. 288; *Reynolds* v. *Ass'n*, 29 S. E. Rep. 187; *Tilley* v. *Ass'n*, 52 Fed. Rep. 618; *American Hd. Co.* v. *Linnigan*, 15 So. Rep. 369; *Pioneer S. & L. Co.* v. *Cannon*, 36 S. W. Rep. 386; Endlich on Bldg. Assn, 341 to 356. Note to 46 Am. St. Repts. 200. Cases cited in 69 Am. Dec. 161; *Vermont L. & T. Co.* v. *Whithed*, 2 N. D. 82. The contract was not usurious under the Minnesota statute. § 2879, Stats. 1894. The same rule is embodied in our statute and has been since 1885. Sec. 6, Ch. 34, Laws 1885; § 3174 Comp. Laws; § 3208 Rev. Codes; *Freie* v. *Ass'n*, 46 N. E. Rep. 784. The legality of a contract is governed by the law with reference to which the parties contracted. The question what law the parties had in view is one of intention. Story on Confl. Law, § 273, n. 4, 479 i., 479 k., 479 m.; Whart. on Confl. of Laws, § 394; *Watts* v. *Camors*, 115 U. S. 353; *Liverpool Steam Co.* v. *Ins. Co.*, 129 U. S. 397; *London Assurance Co.* v. *Campanhie*, 167 U. S. 149, 161; *Wilson* v. *Lewiston Mill Co.*, 44 N. E. Rep. 959. The parties to a contract may stipulate therein what law shall govern its validity, and such stipulation will be enforced. *New Eng. Sec. Co.* v. *McLaughlin*, 13 S. E. Rep. 81; *Dugan* v. *Lewis*, 14 S. W. Rep. 1024; *Caesar* v. *Capell*, 83 Fed. Rep. 403; *Lanier* v. *Co.*, 40 S. W. Rep. 466. This rule applies where the question of usury is not involved. *Vorheis* v. *Peoples Society*, 51 N. W. Rep. 1109; *Jones* v. *Co.*, 63 N. W. Rep. 553; *Penn. Mut. Life Ins. Co.* v. *Co.*, 72 N. W. Rep. 413; *Griesemer* v. *Ins. Co.*, 38 Pac. Rep. 1031; *Watson* v. *Lane*, 20 Atl. Rep. 894. Again the contract should be governed by the laws of Minnesota for the reason that the bond and mortgage are payable in that state. *Bigelow* v. *Burnham*, 83 Iowa 120; *Hull* v. *Cordell*, 142 U. S. 116; *Nat. Mut. B. & L. Ass'n* v. *Ashworth*, 22 S. E. Rep. 521; *Andrews* v. *Pond*, 13 Pet. 65; *Nickels* v. *Peoples Ass'n*, 25 S. E. Rep. 8; *Hubbell* v. *Company*, 32 S. W. Rep. 965; *Odom* v. *Trust Co.*, 18 S. E. Rep. 131; *Sharp* v. *Davies*, 7 Baxt. 607; *Buchanan* v. *Bank*, 55 Fed. Rep. 223; *B. & L. Ass'n* v. *Logan*, 66 Fed. Rep. 827; *Bennett* v. *Ass'n*, 35 Atl. Rep. 684; *Pioneer S. & L. Ass'n* v. *Cannon*, 36 S. W. Rep. 386;

Equitable B. & L. Ass'n v. *Vance*, 27 S. E. Rep. 274; *Equitable B. & L. Ass'n* v. *Hoffman*, 27 S. E. Rep. 692. The mere signing of the bond and mortgage in North Dakota did not make them a North Dakota contract. They did not become binding obligations until they had been received and accepted by the association at its home office in Minneapolis. It was there that they were delivered and accepted. It is the place of delivery, and not the place of execution which is the real place of making of the contract. *Commercial Bank* v. *Simpson*, 90 N. C. 467; *Watson* v. *Lane*, 20 Atl. Rep. 894; *Barrett* v. *Dodge*, 19 Atl. Rep. 530; *Johnson* v. *Gawtry*, 83 Mo. 339; *Buchanan* v. *Drovers Nat. Bank*, 55 Fed. Rep. 223. When a tribunal has a fair choice between the laws of two states it will select the laws of that state where the contract is legal, rather than the laws of the state where the contract would be void. *Bigelow* v. *Burnham*, 90 Ia. 300, 83 Ia. 120; Whart. Confl. Laws, § 429; *Dugan* v. *Lewis*, 79 Tex. 246; *Pritchard* v. *Norton*, 106 U. S. 124; *Gibson* v. *Ins. Co.*, 77 Fed. Rep. 561; *Bell* v. *Packard*, 69 Me. 111; In re Missouri S. S. Co., 42 Ch. Div. 329; 46 Am. St. Rep. 201, 202 n.; 40 Conn. 226, 236. The borrower was a citizen of this state the lender a Minnesota corporation, the parties had a right to contract with reference to the usury laws of either jurisdiction, and the courts will presume that they contracted with reference to the laws of that state where the transaction is legal and not with a view to the laws of the state where the transaction would be void. *Underwood* v. *Am. Mtge Co.*, 24 S. E. Rep. 847; *Miller* v. *Tiffany*, 1 Wall. 298; *Soudder* v. *Union Nat. Bank*, 60 Fed. Rep. 730; *Bigelow* v. *Burnham*, 83 Ia. 120; *Smith* v. *Parsons*, 57 N. W. Rep. 311; *New Eng. Co.* v. *McLaughlin*, 13 S. E. Rep. 81; *Dugan* v. *Lewis*, 14 S. W. Rep. 1024; *Watson* v. *Lane*, 52 N. J. Law 550; *Cromwell* v. *County of Sac.*, 96 U. S. 51-62; *Andrews* v. *Pond*, 13 Pet. 77; Daniel's Neg. Instr'u'ts, § 922; 2 Kent Comm. 460; *Robinson* v. *Bland*, 2 Bur. 1077. The fact that the loan is made on real estate in another state is not controlling. This fact does not make it imperative that the usury law of the state where the land is located should be applied to the transaction. *Central Trust Co.* v. *Burton*, 74 Wis. 329; *Fessenden* v. *Taft*, 17 Atl. Rep. 713; *Oregon Trust Co.* v. *Rathburn*, 5 Sawyer 32, S. C. 18 Fed. Cases, No. 10,555; 4 Law & Eq. Rep. 650. At the time the contract in suit was made no part of the principal was forfeited for usury, the lender in this state forfeited interest only. § 3723 Comp. Laws. The usury law of 1890 went into effect July 1st of that year. Ch. 184, Laws 1890. In no event, therefore, could defendants defeat this action after crediting all payments made as interest, there would still remain due $216. There is no by-law proven in this case, showing that the association fixed by by-law, a minimum premimum for which it would make a loan. Even in the face of such a by-law, defendant could not defeat recovery without showing that in making bid for the loan the borrower acted under the compulsion of such by-law or was influenced thereby. Endlich on Bldg Assns, 411; *Albright* v.

Ass'n, 102 Pa. St. 411, 424; *McCauley* v. *Ass'n,* 37 S. W. Rep. 212. The insolvency of the association followed by the appointment of the receiver has the effect to render the sum loaned due without reference to the terms of the contract. *Curtiss* v. *Ass'n,* 36 Atl. Rep. 1023; *Strohen* v. *Ass'n,* 115 Pa. St. 273; *Towle* v. *Society,* 61 Fed. Rep. 446; *Ass'n* v. *Buck,* 1 Atl. Rep. 561; *Rogers* v. *Hargo,* 20 S. W. Rep. 430; *Weir* v. *Assn,* 38 Atl. Rep. 643; Endlich Building Ass'n, § 523; *Rogers* v. *Raines,* 38 S. W. Rep. 483; *Strauss* v. *Ass'n,* 23 S. E. Rep. 450. Dues paid will not be considered in determining the amount due upon the loan. *Wolford* v. *Ass'n,* 40 N. E. Rep. 694; *Eversman* v. *Schmitt,* 41 N. E. Rep. 139; *Curtiss* v. *Ass'n,* 36 Atl. Rep. 1023; *Goodrich* v. *Ass'n,* 54 Ga. 98; *Strohen* v. *Ass'n,* 8 Atl. Rep. 843; *Rogers* v. *Hargo,* 20 S. W. Rep. 430; *Sullivan* v. *Stucky,* 86 Fed. Rep. 491; *Brown* v. *Archer,* 62 Mo. App. 277; *Weir* v. *Ass'n,* 38 Atl. Rep. 643; *American Ass'n* v. *Gray,* 38 Atl. Rep. 668; *Price* v. *Kendall,* 36 S. W. Rep. 810; *Post* v. *Ass'n,* 37 S. W. Rep. 216; *Knutson* v. *Ass'n,* 69 N. W. Rep. 889. When a person becomes a stockholder in such association he becomes an investor and takes all the risks of an investor. By borrowing money of the association he does not in any manner change his attitude or increase his rights. In case of insolvency the only way to ascertain how much the business has been a failure and how much each stockholder ought to lose is to have all borrowing stockholders return to the association the moneys advanced with interest, less money paid by them on account of the loan. The dues therefore paid upon stock, do not constitute payments upon the loan. Endlich Bldg Ass'ns, § 448, 452, 477 and 478; *Pioneer S. & L. Ass'n* v. *Cannon,* 36 S. W. Rep. 386; *Southern B. & L. Ass'n* v. *Trust Co.,* 15 So. Rep. 123; *Post* v. *Ass'n,* 37 S. W. Rep. 216; 4 Am. & Eng. Enc. L. (2nd Ed.) 1057, 1058. It is conceded that any portion of the premium paid or any interest paid thereon should be deducted from the amount due. *Weir* v. *Ass'n,* 38 Atl. Rep. 643; *Moran* v. *Gray,* 38 Atl. Rep. 668; *Rogers* v. *Raines,* 38 S. W. Rep. 483; *Curtiss* v. *Ass'n,* 36 Atl. Rep. 1023; *Post* v. *Ass'n,* 36 S. W. Rep. 216; Endlich Building Ass'ns, § 523 and 531. Although it has been held that only a proportionate part of the premium paid should be credited to the debtor. *Sullivan* v. *Stucky,* 86 Fed. Rep. 491; *Towle* v. *Society,* 61 Fed. Rep. 446; *Weir* v. *Ass'n,* 38 Atl. Rep. 643-646. As the association is not allowed to enforce the bid of premium it should not be held to its contract to let Cairns have the money at the low rate of six per cent. but should be allowed to charge and collect the legal rate, 7 per cent. *Weir* v. *Ass'n,* 38 Atl. Rep. 643; 4 Am. & Eng. Enc. L. (2nd Ed.) 1081.

M. H. Brennan, for respondent.

Plaintiff claims to act in a capacity which will not be recognized by foreign jurisdictions in matters pertaining to realty. Smith on Receiver, § 84. The exemption of building and loan associations from the usury law only relates to domestic corporations, § 3171

Comp. Laws; *Falls* v. *Ass'n,* 97 Ala. 417; *Ewing* v. *Toledo Sav. Bk.,* 10 Am. & Eng. Corp., Caces 447; *National Loan & Ins. Co.* v. *Stone,* 46 S. W. Rep. 67. These contracts are usurious unless authorized by the state where made. *Falls* v. *Ass'n,* 97 Ala. 417; *Citizens' Security Co.* v. *Uhler,* 48 Md. 455; *Geiger* v. *Ass'n,* 58 Md. 569; *Reiser* v. *Ass'n,* 39 Pa. St. 137; *International Ass'n* v. *Mayers,* 25 S. W. Rep. 1132; *Columbia B. & L. Ass'n* v. *Bollinger,* 78 Am. Dec. 463; *International B. & L. Ass'n* v. *Beiring,* 86 Tex. 484. The premium paid is a cover for usury, it is an artful device to secure for the use of money loaned a price greater than that allowed by law. *Lincoln* v. *B. & L. Ass'n,* 7 Neb. 173; *Simpson* v. *Ass'n,* 42 S. W. Rep. 834; *Watts* v. *Ass'n,* 42 S. W. Rep. 839; *Mills* v. *Ass'n,* 75 N. C. 292; *Mechanics' etc.* v. *Wilcox,* 24 Conn. 153; *Martin* v. *Ass'n,* 2 Cold. 418; *Stevens* v. *Ass'n,* 51 Pac. Rep. 779, S. C. 51 Pac. Rep. 936; *Clague* v. *Creditors,* 20 Am. Dec. 300. The borrower in cases of insolvency is entitled to credit for all payments made. *Rochester Sav. Bk.* v. *Whitmore,* 49 N. Y. Supp. 862; *Thompson* v. *Ass'n,* 27 S. E. Rep. 118; *Strauss* v. *Ass'n,* 23 S. E. Rep. 450; *Robertson* v. *Ass'n,* 69 Am. Dec. 162; *Buist* v. *Ass'n,* 29 L. R. A. 127.

BARTHOLOMEW, C. J. William D. Hale, the appellant, is the duly appointed receiver of the American Savings & Loan Association. As such he seeks to foreclose a mortgage given by Robert Cairns and Ella Cairns to said association. Robert Cairns died before the action was brought, and the defendants Mary and Robert Cairns are his heirs at law. The American Savings & Loan Association was a corporation organized and doing business under the laws of the State of Minnesota, with its home office at Minneapolis. The allegations of the complaint, aside from the allegations as to the insolvency of the association and the appointment of the receiver, are substantially the same as in the case of *Loan Co.* v. *Shain,* (decided at this term) 8 N. D. —, 77 N. W. Rep. 1006. The answer also raises the same issues as in that case. Following the decision in that case, we hold that the contract in this case must be governed by the laws of the State of Minnesota, and that said contract is not usurious.

Upon the question of the proper credits to be given to the defendants, this case differs materially from the Shain case, as the association has become insolvent, and is unable to mature the stock, and consequently unable to complete the contract on its part. In this case the loan was $400, and the premium bid was $400. The evidence of indebtedness took the form of a bond. Ella Cairns signed as one of the obligors. The bond was for $800, but only the sum of $400 drew interest, and that at the rate of 6 per cent. Eight shares of stock were assigned to the association as collateral security; the bond to be paid by the absolute surrender of such stock at maturity. The bond was payable on or before nine years from date. It is conceded, as we understand the record, that on December 19, 1888, Robert Cairns, deceased, subscribed for, and there were issued to

him, ten shares of stock in said association. Subsequently two of said shares were surrendered, and they figure in no manner in this controversy, and we shall treat the matter as a subscription for eight shares. Upon these shares he contracted to make monthly payments at the rate of 60 cents upon each share until the stock matures. Cairns did not apply for a loan until more than a year thereafter, and the loan was not actually made until March 8, 1890. All payments up to that time had been kept up. Consequently there had been paid upon said eight shares, before the loan was made, the sum of $67.20. From the time the loan was made until the insolvency of the association the stock payments were regularly made. This included all payments up to and including October, 1895. Hence he paid upon his stock, after the loan, the further sum of $321.60; and of this amount one-half, or $160.80, was paid upon stock held by the association as collateral security for the bonus or premium. The interest upon the loan of $400 was also paid monthly in advance, and amounted during said term to $134. For what amount of the sums so paid should the respondents receive credit?

This question has received very different answers at the hands of different courts. It has never yet been answered by this Court. It has been held that a proper and equitable adjustment, in cases where the association has become insolvent and unable to mature its stock, is to charge the borrowing member with the amount of money received, with legal interest thereon, and credit him with all that he has paid, "whether paid as fines, penalties, or dues." *Strauss* v. *Association*, 117 N. C. 308, 23 S. E. Rep. 450; *Thompson* v. *Association*, 120 N. C. 420, 27 S. E. Rep. 118; *Buist* v. *Bryan* (S. C.) 21 S. E. Rep. 537. See, also, *Bank* v. *Whitmore* (Sup.) 49 N. Y. Supp. 862. In this case the question was presented in an involved form, and just what the Court decided is not clear. Respondent also cites in this connection *Randall* v. *Protective Union*, 42 Neb. 809, 60 N. W. Rep. 1019. But in that case the association involved was, so far as the record discloses, an entirely solvent corporation; and under such circumstances there can be no injustice in crediting a borrowing member, who chooses to surrender the stock pledged, with all that he has paid thereon. This rule has been frequently applied in Pennsylvania. *North American Garden Ass'n* v. *Tradesman's Bldg. Ass'n*, 46 Pa. St. 493; *Watkins* v. *Association*, 97 Pa. St. 514. But that a different rule, as to credits to be given, should be applied in solvent and insolvent corporations is, we think, entirely clear. The rule is universal that when a corporation becomes insolvent there must be, or at least there may be, a loss to the stockholder. And, from their very nature, the certainty of loss in case of an insolvent building and loan association is greater than in many other forms of investment. They deal only with their members. Their capital consists exclusively of sums paid by their members. They cannot become insolvent in fact without an impairment of that capital, and, if there be an impairment, then the full amount of capital paid in cannot

be returned. That being true, every principle of their organization requires that every dollar of capital that has been paid in upon stock subscriptions should bear its proportionate share of the loss. In End. Bldg. Ass'n, § 514, it is said: "The truth is that there is implied, in the very essence of the building association scheme, an agreement between the members of every association, in the light of which all other agreements, and all rules and by-laws, must be read, and to which they must be conformed; and that is the agreement that all burdens shall be equally borne, as well as all profits equally shared,—that the whole enterprise shall be conducted and the rights and obligations of the participants in it shall be adjusted upon a basis of strict mutuality, equality, and fairness." It is evident that if, in cases of the insolvency of the association, all the borrowing stockholders are to be credited on their indebtedness with all the capital they have paid in, they suffer none of the impairment, and ultimately the entire loss must be borne by the nonborrowing members, and thus the basis of strict mutuality of burdens is entirely disregarded. Equity cannot, therefore, under such circumstances extend to the debtor credit for all he has paid upon his stock. This we think is the rule of the authorities, as well as of reason. *Eversmann* v. *Schmitt*, 53 Ohio St. 174, 41 N. E. Rep. 139; *Wholford* v. *Association*, 140 Ind. 662, 40 N. E. Rep. 694; *Weir* v. *Association* (N. J. Ch.) 38 Atl. Rep. 643; *Moran* v. *Gray*, Id. 668; *Curtiss* v. *Association*, 69 Conn. 6, 36 Atl. Rep. 1023; *Strohen* v. *Association*, 115 Pa. St. 273, 8 Atl. Rep. 843; *Post* v. *Association* (Tenn. Sup.) 37 S. W. Rep. 216.

But, viewing respondents in the light of borrowers only, and turning to the contract, we learn that, for the privilege of receiving the loan, respondents agreed to pay a premium of an amount equal to the cash received. That agreement was made by reason of the inducements held out by appellant, to the effect that both loan and premium could ultimately be paid by a surrender and cancellation of the stock when it reached par, and that the stock could be brought to that condition by small payments thereon at stated intervals, together with the profits that would accrue to such stock through the operations of the association. But the association, by reason of its insolvency, is unable to carry out its contract. It cannot mature the stock. The inducement which caused the respondent to offer the large premium has failed. Hence, whatever has been paid upon such premium, if anything, should be credited to respondents. This we think is the better rule, and it is amply sustained by the authorities last cited, although some Courts have undertaken to apportion the premium, and treat a portion of it as earned. See *Towle* v. *Society*, 61 Fed. Rep. 446; *Sullivan* v. *Stucky*, 86 Fed. Rep. 491. But, under what we regard as the better rule, respondents claim that they should be credited with the dues paid upon the shares of stock that were assigned as collateral to the payment of the premium. (It will be remembered that the premium was included in the bond, but drew no interest.) We

held in the Shain case—and the authorities fully sustain the proposition—that payments made upon stock that was pledged as collateral security for the payment of the loan did not constitute payments upon the loan. This was held upon the theory that the purchase of the stock and the borrowing of the money were distinct and separate transactions. The stock was purchased as an investment, and for the profits which it promised, and these profits inure to the benefit of the purchaser alike whether the stock be pledged or unpledged. *Goodrich* v. *Association,* 54 Ga. 98. True, in the ultimate adjustment it was the intention to exchange the stock for the bond. But, in the language of the New Jersey Court of Errors and Appeals in *Association* v. *Hornbacker,* 42 N. J. Law, 635, "until so exchanged, they are distinct in legal contemplation, as well as in form. The stock is a collateral security for, and not a credit on, the bond." No reason, in law or logic, presents itself to us, why the same rule must not apply to payments made upon stock that is pledged to secure the payment of the premium. Such payment on stock are not payments upon the premium. Hence in this case nothing has been paid upon the premium bid, and there is therefore nothing in that behalf with which to credit respondents. It will be noticed that in this case appellant is not seeking to recover any of the premium. He asks only the payment of the cash advanced, with certain interest thereon, and taxes paid. The association having become insolvent, and having been in the hands of a receiver, it becomes the duty of that officer to proceed to collect the assets of the association. It is his duty to close the business out. The expectations of both parties have been disappointed. The contract is at an end. The interest upon this loan was paid, under the terms of the contract, to November 8, 1895. The appellant is entitled to recover the original loan, with the legal rate of interest in Minnesota, which is 7 per cent., from said November 8, 1895. Should respondents pay this amount, or should it be realized upon a sale of the mortgaged property, respondents will, of course, become the absolute owners of the shares of stock which were assigned as collateral security, and will be entitled to a reassignment thereof. There is a claim made for taxes for the sum of $18.80, which the Court found were paid by plaintiff, and which should also be included in the judgment.

The trial court will set aside its judgment heretofore entered in this case, and enter judgment against the respondent Ella Cairns for the amount heretofore indicated, with the usual decree of foreclosure as to all the respondents. It is so ordered.

Reversed. All concur.

(77 N. W. Rep. 1010.)

JOHN DINNIE, *et al.*, *vs.* O. H. JOHNSON.

Opinion filed November 22, 1898.

Sales—Statute of Frauds.

Section 3958, Rev. Codes, construed: Where an oral agreement for the sale of goods and chattels of the value of $50 or upward is made, and no part of the agreed price is paid, *held*, that a mere delivery of the goods and chattels as stipulated in the agreement will not alone suffice to validate the contract. In such cases the oral agreement is not validated until there has been a voluntary receipt and acceptance of the goods on the part of the buyer.

Delivery—Acceptance—Burden of Proof.

In such cases, where an action is brought against the buyer by the seller for the agreed price of the goods, the seller has the burden, not only to show that the contract of sale was entered into; he must go further, and show that the goods so contracted to be sold were voluntarily received and accepted by the buyer under the contract of sale. The acceptance by the buyer is as vital to the recovery as the existence of the contract to sell.

Instruction Assuming Facts in Issue.

Accordingly, *held*, where both the making of the contract and the acceptance of the goods were in issue and controverted by the evidence, that it was prejudicial error to instruct the jury as follows: "Practically, the only issue in the case is the question as to whether there was a contract entered into between these parties."

Misdirection—Prejudice.

Held, further, that this instruction was an instance of the misdirection of the jury, and was not a mere failure to instruct the jury. The instruction, not being modified elsewhere in the charge, necessarily operated to call the attention of the jury away from the vital question of the receipt and acceptance of the goods by the buyer.

Insufficiency of Evidence to Sustain Verdict.

Held, further, under the evidence in this case, that the order granting a new trial should, under the evidence, be sustained upon the further ground of the insufficiency of the evidence to sustain the verdict, there being no evidence of the voluntary acceptance of the goods and chattels by the defendant, the buyer.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by John Dinnie and another against O. H. Johnson. There was a judgment for plaintiffs, and from an order granting a new trial plaintiffs appeal.

Affirmed.

Bangs & Guthrie, for appellants.

W. J. Burke, for respondent.

WALLIN, J. This action was tried to a jury, and resulted in a verdict for the plaintiffs. A motion to vacate the verdict and for a new trial was made, and was based upon affidavits setting out newly-discovered evidence, and upon a statement of the case settled

by the trial court. The defendant's notice of intention to move for a new trial embraced, with other grounds of the motion, the following, namely: First, newly-discovered evidence; second, insufficiency of the evidence to justify the verdict; and, third, errors of law occurring at the trial, and excepted to by the defendant. The only errors of law assigned arose upon exceptions to the instructions given to the jury. The alleged insufficiency of the evidence to justify the verdict, as specified in the statement, is as follows: "First. The defendant specifies, as grounds for vacating the verdict and granting a new trial, insufficiency of the evidence to justify the verdict, for the reasons as follows: (1) The undisputed testimony shows that the brick in controversy were delivered to D. K. Osbourne, and appropriated and used by him, and that the defendant herein had no interest in such brick; (2) for the reason that there is no evidence showing a delivery of any of the brick in controversy to this defendant; (3) for the further reason there is no evidence showing a receipt or acceptance of such brick, or any of them, by this defendant, the undisputed evidence being that there was no written contract or memorandum, and no part payment made; that the contract is within the statute of fraud." The trial court, in its order granting the motion, omitted to disclose the particular ground or grounds upon which the motion was granted; and the record is silent upon this point. When the motion for a new trial came on to be heard in the court below, defendant's counsel appeared, and objected to the hearing of the motion, upon the ground of newly-discovered evidence, and also then moved to strike out the affidavits embracing such evidence. Said motion to strike out the affidavits was predicated upon certain alleged irregularities in practice detailed in the record, which, however, need not be further referred to here, as the case will be disposed of in this Court upon grounds appearing in the statement of the case, and for reasons wholly independent of the facts and matters set forth in said affidavits.

The plaintiffs, at all times in question, were manufacturers of brick at Grand Forks, N. D.; and this action is brought to recover for a quantity of brick which, it is conceded, were, in the summer and fall of 1892, shipped on the cars by plaintiffs, at Grand Forks, to Neche, N. D., and were received at Neche, and there placed in a certain bank building, which building was the property of the Bank of Neche. Defendant, at the time in question, was one of the directors of said bank. It is undisputed that said Bank of Neche entered into a written contract with one D. K. Osbourne, then residing at St. Paul, Minn., whereby the latter agreed to furnish all the material and labor and build said bank building for a stipulated contract price; and that, pursuant thereto, said Osbourne, in the summer and fall of 1892, did build and complete said building under the said contract. The contract between the Bank of Neche and Osbourne was entered into at St. Paul, on the 12th day of April, 1892. It appears that about May 1, 1892, the defend-

ant was at Grand Forks, and there had an interview with the plaintiffs; and the plaintiffs testify that an oral agreement of sale was then and there made between the plaintiffs and defendant, whereby plaintiffs agreed to sell to defendant the brick necessary for said bank building at the price of seven dollars per 1,000, and to deliver the brick on the cars at Grand Forks. This testmony is disputed by the defendant. Defendant testified, in effect, that he never at any time entered into a contract to buy the brick in question. The fact that the brick were shipped to Neche, and were there taken possession of, and placed in the bank building, by the employes of said Osbourne, is conceded; but whether the defendant ever received or accepted the brick was a question vigorously controverted at the trial, and this is one of the decisive issues in the case. No witness testified that the defendant, or any one in his employ, ever took or had manual possession of the brick, or any of them; but the evidence shows that defendant, in whose name the brick were shipped, did, at the request of the station agent at Neche, sign the freight receipts for the brick. Defendant testified, in effect, that he never received nor accepted the brick in any manner. Under this testimony, the question of whether the defendant received or accepted the brick either on the cars, or at Neche, or at all, was clearly a question of fact for the jury. It will be seen later, however, that this question was not submitted to the jury by the trial court.

The instructions of the trial court to the jury, so far as the same are at all material, were as follows: "Gentlemen of the jury, the issue, and practically the only issue, in the case, is the question as to whether there was a contract entered into between these parties at the time they met, in April or May, 1892." Here followed certain instructions and explanations to the jury concerning the statute of frauds; as applied to sales of personal property, and, after giving which, the Court proceeded to charge the jury as follows: "In this action, gentlemen of the jury, the contract, being for more than the sum of $50, comes under the provisions of that statute; and the plaintiffs allege that they are entitled to recover of the defendant by reason of the fact that the buyer,—that is, they claim that Mr. Johnson accepted and received part of the things sold; that is, that he accepted and received the brick which they claim they sold to him. Now, if you find, gentlemen of the jury, by a fair preponderance of the evidence in this case, * * * that the plaintiffs and defendant entered into a contract at the time testified to, whereby the plaintiffs agreed to sell and deliver to Mr. Johnson, and Mr. Johnson agreed to purchase and to accept from the plaintiffs, the brick necessary to the construction of the building at Neche at the agreed price of seven dollars per thousand, then it is your duty to return a verdict for the plaintiffs. On the other hand, if you find the contract to be as set out by the defendant, or the conversation at the time was as detailed by the defendant, and that there was no agreement to pay on the part of Mr. Johnson, or to

receive and pay for the brick, and that the minds of the parties never met, then it will be your duty to return a verdict for the defendant."

Defendant's counsel excepts to various features of these instructions, and particularly to the following language: "Gentlemen of the jury, the issue, and practically the only issue, in the case, is the question as to whether there was a contract entered into between these parties at the time they met, in April or May, 1892." In effect, the jury, by this part of the charge (and it was not modified), were told that there was practically but one question of fact for them to consider, namely, whether the alleged contract of sale was ever made. It is our opinion that this was error, and, further, that the error is one of misdirection, and is not one of mere nondirection. The sole question submitted to the jury was, it is true, a fundamental question of fact; but, manifestly, it could not be the only question of fact for the jury, unless the jury found, as they did not, that the contract alleged was never made. If the jury had found that the contract of sale had never been made, then, and in that event only, would the one question submitted to the jury have been decisive of the case. The complaint alleged, not only a contract for the sale to defendant of a quantity of brick at a stipulated price, but further alleged performance on plaintiffs' part by a delivery of the brick to defendant. These averments were in issue, and, as we have seen, the delivery of the brick to the defendant, and their receipt and acceptance by defendant, were facts directly controverted by the evidence. The delivery of the brick on the cars by the plaintiffs was established by the undisputed evidence, and the fact that the same brick were laid in the walls of the bank building by Osbourne or his employes is also conceded; but, as we have seen, the fact of defendant's receipt and acceptance of the brick so delivered on the cars is not conceded by the defendant, but is, on the contrary, denied in the defendant's answer, and disputed in defendant's testimony.

It is manifest that the trial court's theory of the case was that inasmuch as the delivery on the cars was undisputed, and that the same brick were used in the building, the question of defendant's receipt and acceptance of the brick was eliminated from the case. And this, perhaps, would be a correct view in a simple common-law contract; but this view is erroneous in the case at bar. The contract in question falls within the statute of frauds, and there having been no memorandum in writing evidencing the terms of the contract, and no money paid on the same, the plaintiffs had the burden of showing an actual and voluntary receipt and acceptance of the goods by the buyer. In such cases the original oral contract, within the statute, does not alone pass title; nor does the title to goods pass, until the unconditional receipt and acceptance of the goods. Such receipt and acceptance, when voluntary and unconditional, relate back to, and validate, the oral contract of sale. This contract in the case at bar is within the statute governing sales of personalty for a price exceeding $50 (Rev. Codes, § 3958), and the

case must be governed by the rule of law applied in the following cases: *Stone* v. *Browning*, 51 N. Y. 211; *Caulkins* v. *Hellman*, 47 N. Y. 449; *Taylor* v. *Mueller*, 30 Minn. 343, 15 N. W. Rep. 413; *Rindskopf* v. *De Ruyter*, 39 Mich. 1. And see Browne, St. Frauds, § 138e. In *Taylor* v. *Mueller*, the Court say: "To constitute a binding acceptance, under a contract otherwise invalid by the statute of frauds, there must be some unequivocal act or conduct on the part of the buyer manifesting an intention to accept and appropriate the goods as owner." In *Caulkins* v. *Hellman*, supra, this language occurs in the syllabus: "No act of the vendor alone, in performance of a contract of sale, void by the statute of frauds, can give validity to such a contract. Where no part of the price is paid by the vendee, there must not only be a delivery of goods by the vendor, but a receipt and acceptance of them by the vendee to pass the title or make the vendee liable for the price." In *Stone* v. *Browning* the following language is used: "The mere receipt of the goods by the vendee will not take a cause out of the operation of the statute of frauds. There must be some act or conduct upon his part manifesting his intention to accept them absolutely and unconditionally, in full performance of the contract of sale." These cases all apply a well-settled rule. Under the rule, the sale cannot be validated by any act of mere delivering to the carrier, or other act done by the vendor alone. Whether, in a case within the statute, where the contract in terms provides that a delivery at a certain place shall itself be considered a receipt and acceptance by the buyer, the contract would be validated by the delivery at the designated place, need not be decided. No such contract is testified to in this case. In this case the plaintiffs merely testified that they agreed to deliver the brick on the cars, and nothing whatever is said in the testimony on either side about the receipt or the acceptance of the brick on the part of the defendant. Under the cases cited, the acceptance of the brick by the defendant was essential to validate the contract, and hence it was prejudicial error to instruct the jury in terms that "practically the only issue in the case is the question as to whether there was a contract entered into between these parties at the time they met, in April or May, 1892." For this error a new trial must be granted.

We think, too, that the order granting a new trial should be affirmed upon the further ground of the insufficiency of the evidence to justify the verdict. There is perhaps some evidence in the record tending, unless explained, to show a receipt of the goods; but we fail to find any evidence whatever in this record of an absolute voluntary acceptance of the brick by the defendant. Where a verdict is vacated, and a new trial granted by a trial court, upon the ground of insufficient evidence, the Court, in so doing, is acting within judicial discretion, and such discretion will not be disturbed in a court of review except in cases of manifest abuse. See *Patch* v. *Railway Co.*, 5 N. D. 55, 63 N. W. Rep. 207; *Gull River Lumber Co.* v.

Osborne McMillan Elevator Co., 6 N. D. 276, 69 N. W. Rep. 691.

The order appealed from is affirmed.

BARTHOLOMEW, J., concurs.

YOUNG, J., having been of counsel, did not sit in the case, nor participate in its decision.

(77 N. W. Rep. 612.)

ANDERSON & HUNTER *vs.* R. R. TODD.

Opinion filed November 22, 1898.

Action on Contract—Substantial Performance.

To entitle a contractor to recover upon a building contract, which has not been fully complied with by him, under the doctrine of substantial performance, it must appear, not only that he endeavored to perform it in good faith, but also that he has done so, except as to unimportant omissions or deviations, which are the result of mistake or inadvertence, and were not intentional, and which are susceptible of remedy, so that the other party will get substantially the building he contracted for.

Facts Do Not Show Substantial Performance.

Facts examined, and *held* not to bring the plaintiffs within the rule.

Taking Possession of Building Not an Acceptance.

Held, further, that the mere fact of taking possession of the building does not of itself amount to an acceptance of the same by the owner as having been erected according to contract.

Appeal from District Court, Walsh County; *Morgan*, J.

Action by Cameron Anderson and K. C. Hunter, co-partners as Anderson & Hunter, against R. R. Todd. Judgment for plaintiffs. Defendant appeals.

Reversed.

John H. Fraine and *Bosard & Bosard*, for appellant.

Bangs & Guthrie, for respondents.

YOUNG, J. Action to recover a balance claimed to be due upon a building contract and for extras, and to enforce a mechanic's lien therefor. The defense is noncompliance with, and nonperformance of, the contract. The trial court determined that the contract had been substantially complied with, and after making certain deductions, to which allusion will be subsequently made, found for the plaintiffs. Defendant appeals, and specifies some 47 errors. These it will not be necessary or useful to consider in detail, for reasons which will appear as we proceed. The defendant, being desirous of erecting a two-story brick building upon a certain corner lot owned by him in the City of Grafton,—the first story to be used for a store, and the second for offices,—caused plans and specifications therefor to be prepared by Orff & Joralemon, architects in Minneapolis. On

July 17, 1894, the plaintiffs, who are contractors and builders, entered into a written contract with defendant to erect such building in accordance with the plans and specifications so prepared, except as to the foundation, which was modified by the following language inserted in the contract: "Instead of foundation being built by piers as shown by plans, said foundation is to be solid foundation under all the exterior walls of said building, to go down six (6) feet below the surface, and to be built at the bottom three (3) feet wide and one (1) foot thick, of concrete, the same as set forth in the plans; and the balance of the wall to be of brick, three (3) feet wide at the bottom, and gradually tapering to the top of said foundation wall, which is to be sixteen (16) inches wide." Plaintiffs also stipulated in said contract "to lay all foundation brick in cement, and foundation wall to be plastered inside and outside with cement, of the same kind set out in plans and specifications;" that is, Yankton cement. Defendant, on his part, bound himself therein to pay the sum of $6,000, as follows: 75 per cent. of the cost of all the material upon the ground, to be estimated every 14 days; the balance "to be paid when the building is completed and turned over, and accepted by the said first party, and when the said second party turns over to the first party receipts in full showing payment of all material used in said building, and payment to all subcontractors in full of the amount due them for material furnished or labor done." The findings of the trial court enumerate certain specific particulars in which the plaintiffs deviated from their written contract, and to which we now call attention: First, Milwaukee or Louisville, and not Yankton, cement was used; the evidence showing that from 180 to 210 barrels were necessary, and that the relative cost thereof per barrel at Grafton was as follows: Milwaukee, $1.44; Louisville, $1.79; Yankton, $3.40. Second. The foundation wall did not taper up 6 feet from a 3-feet width at the bottom to 16 inches at the top, but was blocked into a 16-inch wall 2 feet from the bottom, at a saving of 6,000 brick to the contractors. Third. The plate glass was not free from sand holes. Fourth. The front of the building was not properly constructed. Fifth. The plaintiffs did not turn over receipts showing payments to subcontractors, and for material, as required by the contract. Sixth. The rear and party walls were not built of selected brick, as to color. The trial court held, however, that the plaintiffs had not willfully deviated from the contract, but had acted in good faith, and, upon the basis that there had been a substantial performance on their part, allowed the plaintiff's to recover the contract price, also $188.49 for extras furnished, less payments made, but reduced the balance so found to be due by an allowance for defects and damages as set out in the following finding: "That the total deduction to be made from the contract price of said building by reason of noncompliance with the contract is the sum of $416.46, as follows: Defects in plate glass, $25; defective construction of front, $50; foundation not built as to contract, as per finding No. 13, $275; painting of front $25;

removing rubbish, insurance plate glass in side door, $16.46; pointing up holes in wall $25."

An examination of the evidence satisfies us that the findings of the trial court relating to the deviations from the contract as above indicated are not only sufficiently supported, but are favorable to the plaintiffs; for they rest, not upon disputed and conflicting evidence, but upon the testimony of plaintiffs' own witnesses. Although the findings are silent upon that point, the undisputed evidence also shows that no foundation wall at all was built under the front portion of the building. The defendant's answer placed in issue the performance of the contract, not only generally, but by particularizing various omissions and defects in addition to those already alluded to; including unskillful and careless workmanship, and the use of defective and improper materials. Evidence was introduced which we must say tended to some extent, at least, to establish these further grievances. But in our view it is not necessary to deliberate over conflicting testimony in order to properly determine this case; for, under the controlling facts in the findings themselves, we are convinced that the plaintiffs have not substantially complied with the contract, and they cannot, therefore, recover upon it. It is true that the early rule, requiring a technical and literal compliance with the contract as a condition precedent to a recovery upon it, has been so modified, in the interest of, and for the protection of, the honest, skillful, and prudent contractor, that he may now recover upon his contract when it appears that he has endeavored to perform it in good faith, and according to its terms, and has done so, except as to unimportant omissions or deviations, which are the result of mistake or inadvertence, and were not intentional, and which are susceptible of remedy, so that the other party will get substantially the building he has contracted for. In such event the doctrine of substantial performance prevails, and the contractor may recover the contract price, less the expense of repairing the defects and omissions. See *Leeds* v. *Little* (Minn.) 44 N. W. Rep. 309; *Elliott* v. *Caldwell* (Minn.) 45 N. W. Rep. 845; *Smith* v. *Brady*, 17 N. Y. 173; *Aldrich* v. *Wilmarth* (S. D.) 54 N. W. Rep. 811; *Crouch* v. *Gutmann*, 134 N. Y. 45, 31 N. E. Rep. 271; *Pullman* v. *Corning*, 14 Barb. 174; 2 Beach, Mod. Cont. § 1729; *Glacius* v. *Black*, 50 N. Y. 145; *Phillip* v. *Gallant*, 62 N. Y. 256; *Woodward* v. *Fuller*, 80 N. Y. 312; *Heckmann* v. *Pinkey*, 81 N. Y. 211; *Glacius* v. *Black*, 67 N. Y. 563; *Nolan* v. *Whitney*, 88 N. Y. 649. But the doctrine does not go to the extent of compelling a person to pay the contract price for a building differing in important particulars from that for which he has contracted. The defendant had a right to use his own judgment as to the kind of material to be used in this structure, and his own taste to fix the style of its architecture. All the details were set our fully in the written specifications and contract. This contract governs their rights. Upon its performance the defendant had agreed to pay the contract price, and by a performance of its obligations, as a condition precedent, the plaintiffs are

enabled to compel payment of the contract price, and in that way only. The language of the Court in *Smith* v. *Gugerty*, 4 Barb. 614, which was an action on a building contract, further illustrates what we have said: "The builder seems to suppose that, while he adheres generally to the plan which is prescribed for him, he is at liberty to disregard minute and unimportant particulars, while the owner imagines that a departure from such plan in any respect, although it may be the effect of accident, and of no possible injury to him, exonerates him from the obligation of making any payment which is in terms made dependent upon the full performance of the contract. Both are wrong. Parties should undoubtedly be exact in the fulfillment of their agreements, even to the smallest particular; and, if they willfully or carelessly depart from any one of them, they should incur the penalty, however severe it may be. But if a party, acting in good faith, and with a determination to do what he has contracted to do, should unintentionally, and without any negligence, happen in some trifling and unimportant matter to vary or depart from the terms of his agreement, the law is not so severe and exacting as to deprive him of all compensation." In this case the facts do not bring the plaintiffs under the protection afforded to those who have not fully, but have substantially, performed their contract. The plans and specifications were in writing, and were for plaintiffs' guidance. It is plain they did not follow them in the particulars already noted. These deviations and omissions were, in our judgment, neither slight, unintentional, innocent, nor easily remedied. The building is not that provided for in the contract. The record shows that evidence was offered at the trial tending to show that the foundation actually built, and the materials actually used, while differing from, were in fact as good as, those the contract called for. This might possibly be available in a different form of action, but it has no place here, for reasons already noted; this action being upon the contract. *Aldrich* v. *Wilmarth* (S. D.) 54 N. W. Rep. 811, and cases cited.

It appears that the defendant took possession of the building, and the Court so found. This does not amount to an acceptance of the same as having been erected according to the contract. *Elliott* v. *Caldwell* (Minn.) 45 N. W. Rep. 845; *Smith* v. *Brady*, 17 N. Y. 173. As to the effect this should have, counsel for respondents quotes from Beach on the Modern Law of Contracts (volume 2, § 1728): "Where one has entered into a special contract to perform work for another, and has done the work, but not in the time or manner stipulated in the contract, if the work done is accepted and used by the other party the latter is answerable, to the amount he is benefited, upon an implied promise to pay for the value he has received." This question, upon which there is some conflict in the authorities, we need not discuss; for plaintiff's action is not based upon an implied contract, but upon their express written agreement. The defendant very properly saw fit to specify in writing the

kind of a building he wished erected, and the quality of labor and material to be used. A compliance with these requirements, saving innocent and unintentional deviations and omissions capable of being remedied, were conditions precedent to his right to recover on the contract. It is conceded that defendant has paid to plaintiffs the sum of $4,856.08, which more than covers the amount allowed for extras, and such payments as the contract bound defendant to make prior to its complete performance. We may also add that we find nothing in the case which prevents defendant from standing upon the terms of his contract. For the reasons already stated, the judgment of the lower court herein is reversed, and that court is directed to enter a judgment dismissing this action. All concur.

(77 N. W. Rep. 599.)

FIRST METHODIST EPISCOPAL CHURCH *vs.* JOHN O. FADDEN.

Opinion filed November 26, 1898.

Amended Pleading Supercedes the Older One.

It is the province of the Court to declare upon what pleadings a case must be tried. Counsel cannot control the matter.

Statutes Changing Rule of Evidence.

When a statute changing a rule of evidence has gone into effect, cases thereafter tried must be governed thereby, unless there be a limitation in the statute, although the pleadings were filed before the law went into effect.

Prima Facie Evidence—Recorded Instrument.

Where a statute expressly makes the record of an instrument prima facie evidence of the facts therein stated, such record, when offered in evidence, is not vulnerable to the objection that it is secondary.

Affidavit of Mortgage Foreclosure Sale by Deputy Sheriff.

It is necessary to a valid affidavit of foreclosure sale, as required by our statute, that it show on its face that the sale was made by some person authorized by law to make such sale; and, when the party making the sale states in his affidavit that he is a deputy sheriff, the statute makes the affidavit prima facie evidence of that fact, and no other proof of his official capacity is required until such prima facie case is overcome.

Purchaser of Real Estate Subject to Mortgage—Rights of

A grantee of real estate who takes the same subject to a mortgage thereon is not required, upon foreclosure of said mortgage, to pay the attorney's fee specified in the mortgage, when the same exceeds that allowed by law.

Sale for More Than Mortgage Debt—Surplus to Mortgagor.

An officer who sold mortgaged property for an amount in excess of what was due under the terms of the mortgage cannot excuse himself for not paying such excess to the mortgagor on demand, by showing that the excess went into the hands of the mortgagee

Motion for Directed Verdict—Courts Finding on Facts.

When, at the close of the testimony, each party moved for a directed verdict in his favor, and, the motion of one being overruled, he did not ask that any question of fact be submitted to the jury, such party must be regarded as having submitted all controverted questions of fact to the Court for determination, and the decision of the Court thereon will not be disturbed if it have support in the testimony.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by the First Methodist Episcopal Church of Grand Forks against John O. Fadden. E. H. Rollins & Son intervened. From a judgment for plaintiff, defendant appeals.

Affirmed.

Burke Corbett, for appellant.

Bosard & Bosard, for respondent.

BARTHOLOMEW, C. J. This action originated in Justice Court, was appealed to the District Court, and a trial there resulted in a directed verdict for plaintiff. A motion for a new trial was denied, and defendant appeals from the order. The defendant, as sheriff of Grand Forks county, acting through a deputy, sold the church property belonging to the plaintiff, under a statutory foreclosure of a mortgage upon such property executed by plaintiff's grantor. The property sold for the full amount claimed in the notice of sale, being the amount due upon the note secured by the mortgage and an attorney's fee of $100, together with the costs of sale. The property was purchased by the mortgagee. The statute then in force (chapter 16, Laws 1889) declared that for foreclosing a mortgage upon real estate, where the same was done by a resident attorney, there should be allowed an attorney's fee of "ten dollars, and no more." Plaintiff, claiming that the property sold for $90 more than was due thereon, demanded such sum from defendant, and, upon his failure to pay the same, brought this action. The answer was in denial, and especially denied plaintiff's corporate capacity. It admitted the demand, and set up full satisfaction and settlement of the claim by the mortgagee. The answer was not verified. At the trial in Justice Court, plaintiff offered no evidence of its corporate capacity. The answer was filed December 28, 1895. The case was not tried until after January 1st, 1896, the date at which the Revised Codes went into effect. Under the statute in force prior to that time (section 2908, Comp. Laws), a corporation plaintiff was required to prove its corporate capacity where it was specifically denied by the answer. Under section 5754, Rev. Codes, no proof of corporate existence was required, unless such existence was denied under oath. The justice ruled that, insomuch as the answer was filed before the new law went into effect, its provisions could not control at the trial, and dismissed the case for want of proof of corporate existence. After plaintiff appealed to the District Court, the mortgagee, a corporation, was permitted to inter-

vene; but neither the petition in intervention nor any other pleading on its part appears in the abstract. Subsequently, plaintiff served and filed an amended complaint in the action. No new issues were pleaded, but the facts were stated more fully and in detail. To this amended complaint defendant answered, setting forth the same defenses, in substance, as in his original answer. Neither of these pleadings were verified. On the opening of the trial in the District Court, plaintiff's counsel stated that he would go to trial on the original and amended pleadings, and read the same to the jury. Subsequently the Court ruled that the case must be tried on the amended pleadings. This was the first ground urged for a new trial. It is not tenable. It was for the Court to say upon what issues the case stood for trial. It was not the province of counsel to determine that matter. It is elementary that where a pleading is filed which purports to be, and is in fact, an amended pleading, and not an amendment to a pleading the old pleading, as such is superseded. A party cannot have two distinct and complete complaints in the same case at the same time. Defendant doubtless desired to have the case tried upon the pleadings as made in Justice Court, hoping thereby to force plaintiff to prove its corporate existence. But, even under those pleadings, no such result could have followed. The provision in the Revised Codes simply related to a matter of proof, to a rule of evidence, and applied in pending cases, as well as cases to be commenced. *Conrad* v. *Smith*, 6 N. D. 337, 70 N. W. Rep. 815.

The second point urged relates to rulings upon evidence. Plaintiff, over defendant's objections, introduced in evidence the record of the foreclosure. We need not dwell on this feature of the case. The statutes then in force specifically make the record that was offered—to-wit, the record of the duplicate certificate of sale made by the person who conducted the same, the affidavit of publication of notice of sale, and the affidavit of sale made pursuant to such notice—prima facie evidence of the facts therein contained. These records show the amount that was claimed to be due upon the mortgage. They show the fact of sale, and show the amount for which the property was sold, and show the items that were included in such amount. The sale was made for the amount claimed in the notice of sale, with interest to the date of sale, and an attorney's fee of $100, and the proper costs. It is urged that this does not show that the propery was sold for more than was legally collectible under the mortgage. We think it makes a prima facie case, and the defendant did not attempt to dispute it. But the record shows that the sale was made by the defendant as sheriff, by one George A. Bangs as deputy. It is urged that the record is incompetent to bind defendant until it is shown that George A. Bangs was deputy sheriff. Under the statute, the affidavit of sale must be made by the party who made the sale; and that, under section 5416, Comp. Laws, must be either the person appointed by the mortgage to make the sale, or the sheriff of the county, or his deputy. It is patent that an affidavit of sale that did not show on its face that the sale was made by some

party having authority to make it would be worthless. Such an allegation is a necessary and material fact to be stated therein; and the affidavit is declared by statute to be prima facie evidence of the facts therein stated. In this case the affidavit is made by George A. Bangs, and he swears that he is the person who made the sale, and that he is the deputy sheriff of Grand Forks county. It is therefore established prima facie that George A. Bangs was deputy sheriff at the time he made the sale.

It is urged that as plaintiff in this case is the grantee of the original mortgagee, and took subject to the mortgage, it cannot take advantage of the attorney's fee, but must pay the same as stipulated in the mortgage. Defendant claims that where a subsequent grantee assumes and promises to pay an existing mortgage, and the amount is treated as a part of the purchase price, that such grantee cannot, when called upon to pay the mortgage, set up as a defense that the mortgage transaction was usurious as between the original mortgagor and mortgagee. We need not stop to discuss the legal principles upon which this ruling has been made. They will occurr to every lawyer. Those principles cannot apply here for two reasons: This plaintiff did not expressly assume or promise to pay the mortgage. There is nothing to indicate that the amount was treated as a part of the purchase price. The covenant against incumbrances in plaintiff's deed excepts this mortgage, but that is the only reference to it. Another conclusive answer to this contention is the fact that when this mortgage was given, and when the property was transferred to plaintiff, and when the mortgage was foreclosed, the statute in force in express terms limited the attorney's fee that could be collected under a foreclosure by advertisement to $10. If we grant that plaintiff expressly assumed the mortgage, it agreed to pay just the sum which, on the face of the mortgage, the law required it to pay in order to satisfy the mortgage. That amount all parties to the transaction were obliged to know, and nothing further can be claimed.

It is urged that this defendant is not liable in this action, because the evidence shows that this attorney's fee was received by the mortgagee, and that the same never came to the hands of the defendant. This will not excuse the defendant. The party who makes the sale is, in law, conclusively presumed to have received the amount for which he reports that he sold the property; and in *Johnson* v. *Day*, 2 N. D. 295, 50 N. W. 701, this Court said: "Nor would a mistake of the officer in ascertaining such amount in any manner bind the mortgagor or relieve the officer from liability to him for any surplus beyond the actual amount going to the mortgagee; and, if such excess had been paid to the mortgagee, then both the officer making the sale and the mortgagee receiving the money would be liable to the mortgagor for the amount of such excess upon demand made." That case settles defendant's liability.

The last defense urged is that the evidence shows that this claim was adjusted and settled between plaintiff and the mortgagee. We

need not enter into the details of the transaction which it is claimed included this settlement, further than to say that, as a result of certain correspondence, the general Western agent of the mortgagee agreed to accept 8 per cent. interest during the year of redemption, instead of the 12 per cent. allowed by the statute. But we are not in full sympathy with the extravagant claims of charity made by counsel for defendant. The practical condition was such that the mortgagee must accept 8 per cent. on its investment, or have the church property left on its hands. When this alternative was presented to an Eastern money-loaning corporation, we think it required no heavy draft on its charity to induce it to accept the 8 per cent. But, during the correspondence that led to this result, mention was made of this excessive attorney's fee; and if the question whether or not such fee was included in the adjustment had been regularly submitted to the jury, and the jury had found that it was so included, it may be that a Court could not have disturbed such finding. But in this case, at the close of the testimony, each party moved for a directed verdict in his favor. The motion of defendant being overruled, he requested no question of fact to be submitted to the jury. In this state of the record, it is well settled that the defendant must be regarded as having submitted all controverted questions of fact to the Court for decision. This rule was applied by this Court in *Stanford* v. *McGill*, 6 N. D. 536, 72 N. W. Rep. 938, and the authorities are fully cited on page 572, 6 N. D., and page 952, 72 N. W. Rep. We again applied the rule in *New England Mortg. Sec. Co.* v. *Great Western Elevator Co.*, 6 N. D. 407, 71 N. W. 130. The rule must control here, and there is evidence in the case strongly tending to show that the excess of attorney's fee was not included in the adjustment made. The trial court must have found that it was not so included. We find no error in denying the motion for a new trial, and the order is affirmed. All concur.

(77 N. W. Rep. 615.)

E. C. CARRUTH *vs.* E. C. TAYLOR.

Opinion filed November 28, 1898.

Final Order in Habeas Corpus Not Appealable Order.

Chapter 20 of the Code of Criminal Procedure, and section 5626 of the Code of Civil Procedure, regulating appeals, considered and construed. *Held*, that the procedure under the habeas corpus act is not governed by that regulating the special proceedings enumerated in chapter 39 of the Code of Civil Procedure; and, consequently, it is *held* that a final order in a habeas corpus case is not an appealable order, as a final order affecting a substantial right made in a special proceeding.

Supreme Court Original Jurisdiction.

Held, further, that, while it is competent for the legislature to regu-

late and reasonably restrict the privileges of habeas corpus, it cannot by statute wholly deprive this Court, in the exercise of its original jurisdiction, of the right to issue the writ.

Procedure for Review of Habeas Corpus.

Held, further, when liberally construed, that section 8651, Revised Codes, as amended by chapter 85 of the Session Laws of 1897, will permit a petitioner who has been remanded by the District Court to apply to this Court for the writ, and thereupon this Court will be authorized to reinvestigate and redetermine the case.

Title of Habeas Corpus Proceedings.

Held, further, that inasmuch as the state is a necessary party to a habeas corpus proceeding, good practice requires that the state should be made a party, in entitling the papers in such proceeding. Bartholomew, C. J., dissenting.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Petition of E. C. Carruth for a writ of habeas corpus directed to E. C. Taylor, sheriff. Judgment remanding petitioner, and he appeals.

Dismissed.

Burke Corbett, for appellant.

The order denying the discharge of appellant was appealable under sections 5603 and 5626, Revised Codes. *Winton* v. *Knott*, 7 S. D. 159, 63 N. W. Rep. 783. In re Hammill, 9 S. D. 390, 69 N. W. Rep. 577; In re Fawkes, 53 Fed. Rep. 13. It is the right and duty of a Court before the removal of one accused to a distant forum for trial to look into the indictment so far as to be satisfied that an offense is charged and that it is such an offense as may be lawfully tried in the forum to which it is claimed the accused should be removed. *United States* v. *Horner*, 44 Fed. Rep. 667; In re Dana, 7 Ben. 1; In re Buell, 3 Dill. 116, Fed Cases No. 2102. The sufficiency of the indictment to charge a public offense and one triable in the jurisdiction where presented is not alone for the Court in such jurisdiction. In re Corning, 51 Fed. Rep. 205; In re Terrell, 51 Fed. Rep. 213; In re Fawks, 49 Fed. Rep. 50; In re Fawks, 53 Fed. Rep. 13; In re Doig, 4 Fed. Rep. 193; In re Palisser, 136 U. S. 257, 10 Sup. Ct. Rep. 1034; *Horner* v. *U. S.*, 142 U. S. 207, 12 Sup. Ct. Rep. 407. And the procedure is by habeas corpus. In re Greene, 52 Fed. Rep. 104; *United States* v. *Rogers*, 23 Fed. Rep. 658.

E. S. Allen, States Attorney (*R. N. Stevens* of counsel), for respondent.

WALLIN, J. This record discloses the following facts: The petitioner, E. C. Carruth, was arrested in the County of Grand Forks upon a warrant charging him with the offense of criminal libel. Said arrest was made by one E. C. Taylor, who was the sheriff of Burleigh county, and who acted in making the arrest under and by virtue of said warrant, which warrant was issued by a justice

of the peace of Burleigh county, and was regular upon its face. Subsequent to said arrest, and upon an application therefor made by the petitioner to the District Court for Grand Forks county, the writ of habeas corpus issued out of said Court, commanding said sheriff to make return to said writ, and bring the petitioner before said Court, together with the cause of his detention. In obedience to the writ the petitioner was brought before said Court, and the cause of his arrest was there inquired into and considered; and that Court determined that the petitioner was not unlawfully restrained of his liberty, and entered an order remanding the petitioner to the custody of the sheriff. The petitioner has attempted to appeal to this Court from said order, and, with that end in view, has served a notice of appeal upon the state's attorney for Grand Forks county, and upon the attorney for said sheriff, and has filed such notice with the clerk of the District Court for Grand Forks county. The petitioner also filed an undertaking in the usual form for the costs and damages incident to such appeal, in the sum of $250. In addition to said undertaking for costs, the petitioner filed with the clerk of the District Court an undertaking, in the nature of a stay or surpersedes, in the sum of $100, which undertaking was filed in conformity to an order of said Court staying the performance of the remanding order. Pursuant to said notice of appeal and proceedings, the clerk of the District Court has transmitted the entire record to this Court. In the view we have taken of the case, it will be unnecessary to set out the grounds upon which the petitioner claims that he is entitled to be discharged from custody. Respondent's contention is that this Court is without authority to review the adjudcation of the District Court which culminated in the remanding order. If the respondent's contention is sustained,—and we think it must be,—it follows that this Court is without authority to determine any of the questions touching the merits appearing in the record.

The notice of appeal is entitled as follows: "E. C. Carruth, Petitioner, vs. E. C. Taylor, Defendant." Assuming that an appeal will lie, this is an irregularity, inasmuch as the proper parties in habeas corpus are the state and the petitioner. But the notice was served upon the state's attorney of Grand Forks county, which officer, for the purposes of habeas corpus, represents the state in the court below. Rev. Codes, § 8669. As the petition is regular in other respects, it can be upheld as sufficient in substance; and this minor matter is adverted to only for the purpose of indicating the proper title of the habeas corpus proceeding, and also for the purpose of calling attention to the important consideration that the state, as such, in issuing his prerogative writ, is a party to the proceeding.

It is elementary that the right of appeal is a statutory right, and this rule is especially applicable in habeas corpus cases, as many states have held that the decisions in this class of cases are not reviewable under a general law allowing an appeal from all final judgments. See *Howe* v. *State*, 9 Mo. 403; Ex parte Jilz, 64 Mo. 205. In Michigan the rule is that in habeas corpus an order dis-

charging the petitioner is not reviewable on writ of error. *People* v. *Conant*, 59 Mich. 565, 26 N. W. Rep. 768. The general rule is indicated by the language of the Court in the case last cited. The Court say, "We know of no statute or practice allowing the people the right to bring error for the purpose of obtaining a review of the proceedings in the Circuit Court when the prisoner has been discharged, in this class of cases." In Iowa, where the right of appeal in this class of cases is expressly conferred by statute, it is held that an order discharging the petitioner is not appealable. In *State* v. *Kirkpatrick*, 54 Iowa, 373, 6 N. W. Rep. 588, the Court say, "In a habeas corpus proceeding an order of discharge made by the Court cannot be superseded pending an appeal." It must be conceded, however, that in some states the right of appeal has been expressly granted by the legislature. This is true of the State of New York. In other states it has been held, as in Minnesota and South Dakota, that a final order in a habeas corpus proceeding is appealable under a statute which gives an appeal from a final order affecting a substantial right made in a special proceeding. See Rev. Codes, § 5626; Comp. Laws, § 5236; *State* v. *Buckham*, 29 Minn. 462, 13 N. W. Rep. 902; *Winton* v. *Knott* (S. D.) 63 N. W. Rep. 783; In re Hammill (S. D.) 69 N. W. Rep. 577. Under the Minnesota and South Dakota cases, construing a statute indentical in its language with section 5626 of the Revised Codes, the appellant's counsel claims that the order of the District Court in this case is an appealable order. The citations of counsel are squarely in point, and it must be conceded that they furnish a strong support for the appellant's contention. It would clearly be the duty of this Court to rule in accordance with this authority, unless this Court, after mature and conscientious deliberation, shall be convinced that to yield its assent to the rule would operate practically to subvert constitutional safeguards and the fundamental rights of the citizen. We do not think that the legislature of this state ever intended to give an appeal to either party in a habeas corpus case, nor do the cases last cited do more than to declare in arbitrary terms the contrary rule. The matter seems to have been taken for granted by the learned Courts whose decisions are cited. In *State* v. *Buckham* the Court say: "A proceeding in habeas corpus is a special proceeding, not only because it is not an ordinary civil action, but because it is so expressly classified in our statutes." It is true that this proceeding is not a civil action, nor is it a criminal action; but the argument that the proceeding is classified as a special proceeding cannot be urged in this jurisdiction, because such is not the fact. The habeas corpus statute in this state is embodied in the Code of Criminal Procedure, and constitutes chapter 20 of that Code. Rev. Codes, § § 8648, 8688. The first section of that Code is as follows: "This act shall be known as the Code of Criminal Procedure of the State of North Dakota." Rev. Codes, § 7740. The same classification was made in the Compiled Laws of the Territory of Dakota. Comp. Laws, § 7025. This Court has, how-

ever, repeatedly ruled that the mere fact that a proceeding in court is neither a civil action nor a criminal action is not necessarily decisive of the question of whether it shall be classified as a special proceeding, and hence be governed by the law and the procedure of special proceedings proper. *State* v. *Davis,* 2 N. D. 461, 51 N. W. Rep. 942; *Myrick* v. *McCabe,* 5 N. D. 422, 67 N. W. Rep. 143; In re Eaton, 7 N. D. 269, 74 N. W. Rep. 870. In the case last cited this Court said: "The Davis case is a precedent which commits this Court to the theory that a remedial proceeding in court, which is neither a civil nor a criminal action, need not necessarily be classed as a special proceeding for all purposes. We are still of the opinion that this theory, if maintained, will tend to promote the orderly administration of the law, and thereby promote the ends of justice." Upon the authority of these cases, it becomes the duty of this Court, therefore, to determine whether the habeas corpus act, consisting of 40 sections of the Code of Criminal Procedure, and embracing a full and comprehensive regulation of the writ in all of its known functions, is to be grouped with special proceedings proper. If it is, it follows, under the statute, that, except as otherwise provided in the act, the rules of procedure and practice which govern in civil actions must be applied to habeas corpus proceedings. Rev. Codes, § 6128. While it is true that habeas corpus has been denominated a "proceeding of a civil nature," and doubtless this is the better scientific view, yet this does not, in our opinion, necessarily imply that its procedure shall be governed by the procedure regulating special proceedings or civil actions in a state where the statute governing the writ makes necessary a different procedure. In this jurisdiction chapter 39 of the Revised Codes embraces provisions regulating certain remedial writs, viz: the writs of certiorari, mandamus, and prohibition, and nothing else is contained in said chapter. In our judgment, these provisions of the Code, when considered in connection with the classification of the writ of habeas corpus with criminal proceedings, is enough to show that the lawmaker deliberately removed the procedure of the writ from that controlling special proceedings. If this construction of the statutes is the true one, it follows that a final order in a habeas corpus proceeding either remanding or discharging the petitioner is not a final order in a special proceeding, and hence is not appealable as such under section 5626, Rev. Codes. That statute does not discriminate by giving an appeal to one party to a special proceeding, and withholding it from the other, and hence, if this proceeding is governed by this statute, an appeal would lie in behalf of the state from an order discharging the petitioner; and it was distinctly held in *State* v. *Buckham,* 29 Minn. 462, 13 N. W. Rep. 902, that an appeal would lie on the part of the state under the statute allowing an appeal from a final order in a special proceeding. In its opinion in that case the Court uses this language: "If, as is alleged in the case at bar, a person imprisoned for crime is wrongfully discharged in habeas corpus proceedings, the state is the aggrieved

party whose substantial right is affected." But section 8672 of the habeas corpus statute is as follows: "No person who has been discharged by the order of the court or judge upon habeas corpus can be again imprisoned or kept in custody for the same cause except in the following cases. The exceptions found in the several subdivisions of this section have no application to the case at bar, and hence it is unnecessary to quote them here. Under this section a petitioner who has been once discharged by habeas corpus cannot lawfully be kept in custody for the same cause, unless his case falls within one of the exceptions stated in said section. This provision is squarely opposed to the theory that the petitioner can, after his discharge, be kept in custody on the same charge under any circumstances whatever, other than those specified in this section. This beneficent provision is of the very essence of the relief by habeas corpus, and the decided weight of judicial opinion is, in the absence of a statute, that a discharge under the writ, whether properly made or not, cannot be reviewed in any manner. As has been seen, this was the holding in the cases from Michigan, Missouri, and Iowa already cited. See, to the same effect, *State* v. *Grottkan,* 73 Wis. 589, 41 N. W. Rep. 80, 1063. As our appeal law is taken literally from the statutes of Wisconsin, it is quite pertinent to the question under discussion to note the fact that in that state habeas corpus proceedings, when reviewable at all, are brought up either by certiorari or writ of error, thereby ignoring the appeal law. *State* v. *Smith,* 65 Wis. 93, 26 N. W. Rep. 258, and *Wright* v. *Wright,* 74 Wis. 439, 43 N. W. Rep. 145. At common law the rule was well settled that, while a remanding order was not res adjudicata, an order for a discharge was final. Church, Hab. Corp. p. 520, and cases cited.

But the habaes corpus statute in this state further provides as follows: "Any person who knowing that another has been discharged by order of a competent judge or tribunal on a habeas corpus, shall, contrary to the provisions of this chapter, arrest or detain him again for the same cause which was shown on the return of such writ, shall forfeit five hundred dollars for the first offense and one thousand dollars for every subsequent offense." Rev. Codes, § 8685. In an action brought to recover this penalty, for example, against an officer who knowingly, and after an order of discharge, continued to hold the petitioner in custody upon the same charge, it would be no defense, in our judgment, to plead that he held the prisoner for some reason other than those enumerated in chapter 20 of the Criminal Code. Until the officer could point to a repeal of the provision of chapter 20, his defenses would be confined to the exceptional cases stated in section 8672 of that chapter. It is not contended that any of the provisions of chapter 20 have ever been expressly repealed. If repealed, such repeal must have resulted from the enactment of some later statute so repugnant to the habeas corpus act that the two cannot stand to-

gether and both be enforced. It is elementary that repeals by implication are not favored.

We now call attention to the fact that the law governing appeals from the District Court in civil actions and special proceedings, if applied to the writ of habeas corpus, would in its practical operation, necessarily defeat the chief purpose of the writ. Section 5619, Rev. Codes, provides that when " the state * * * shall take an appeal service of the notice of appeal shall perfect the appeal and stay the execution or performance of the judgment or order appealed from and no undertaking need be given; but the Supreme Court may on motion require sureties to be given in such form and manner as it shall in its discretion prescribe as a condition of the further prosecution of the appeal." Under this section, if held to be applicable to habeas corpus, a party who has been adjudged to be illegally imprisoned by a court of competent jurisdiction, could despite such adjudication, be continued in custody upon the same charge, and that, too, without any indemnity whatsoever. If such were possible, it would require only a notice of appeal, emanating from the state's attorney, to secure the continued incarceration of the petitioner for an indefinite period. Such a result would be so monstrous a perversion of the "liberty writ," that this Court cannot hold that it was ever intended by the legislature to make the law governing appeals applicable to a habeas corpus case; and, before we should hold that an order of discharge could be reviewed in any manner, some statute must be pointed out authorizing such a review in terms. There is at present no such statute in this state. We fully recognize the fact that an order remanding the petitioner in a habeas corpus case cannot, under our construction of the statute, be reviewed on appeal. But we hold that the practical effect of our construction of the appeal law is not to deny the citizen the full benefits of habeas corpus. There are other tribunals whose duty and right it is to take jurisdiction and reinvestigate the question after the District Court has decided the matter and remanded the petitioner. Where an application is made to this Court in such case, the statute allows this Court, or a judge thereof, to order the writ to issue, and make the same returnable before any District Court or judge thereof within the state; or this Court, at its election, can take jurisdiction, and reinvestigate the original cause of imprisonment. See chapter 85, Sess. Laws 1897. At common law, as has been seen, an order in habeas corpus proceedings remanding the petitioner to custody is not res adjudicata. The first adjudication at common law was not a bar to another inquiry upon the same state of facts. It is well settled that, in the absence of restrictive statutes, a prisoner is entitled to exhaust the entire judicial authority of the state courts and of the federal courts having authority to act, in his efforts to free himself from unlawful imprisonment. See Church, Hab. Corp. 518, 519. See, also, In re Snell, 31 Minn. 110, 16 N. W. Rep. 692, which is a well-considered case. Under these author-

ities, and under the constitution of this state, a person incarcerated within this state has the unassailable right, except when restricted by some statute, to apply to all courts, for the "liberty writ," which, under the constitution of the state, have jurisdiction in habeas corpus cases. It is, however, well settled that the legislature may regulate the practice, and may place reasonable restrictions upon the exercise of this constitutional right. In re Doll, 47 Minn. 518, 50 N. W. Rep. 607; In re Hammill (S. D.) 69 N. W. Rep. 577. In the case last cited, which was an original application for the writ made to the Supreme Court, the writ was denied because it did not appear that an application had been previously made to the Circuit Court. This was the true ground of the decision, and what was there said concerning the right of appeal was not necessary to the decision of the case, as the right of appeal was not involved. But the right to enact laws regulating and reasonably restricting the use of the writ is well recognized. In the exercise of the right to regulate the procedure, the legislature has enacted chapter 20 of the Code of Criminal Procedure, and that act embraces no provision giving the right of appeal to either the state or the petitioner; but, in lieu of an appeal, the act, in our judgment, has made ample provision under which a prior adverse adjudication may be practically overruled and annulled by a decision of this Court made upon the application of any person unlawfully remanded in the court below.

Section 8651, Rev. Codes, as amended by chapter 85, Laws 1897, declares that the District Courts may issue and determine the writ in behalf of any person "restrained of his liberty in their respective districts." It is manifest that after the District Court has once taken jurisdiction of a habeas corpus proceeding, and fully determined the same upon the merits, such court has rendered itself legally incapable of reinvestigating the case upon the same state of facts. That court cannot review its own deliberate and final adjudications. But the act of 1897 further provides, "When application is made to the Supreme Court, or to a judge thereof, proof by the oath of the person applying or other sufficient evidence shall be required that the judge of the District Court having jurisdiction by the provisions of subdivision 2 of this section is absent from his district or has refused to grant such writ, or for some cause to be specially set forth is incapable of acting, and if such proof is not produced the application shall be denied." The suggestion cannot be indorsed by this Court that the legislature intended by these regulative provisions to curtail the constitutional rights of the citizen to the writ—First, by forbidding him the right to obtain the writ from any of the District Courts of the state except that in whose district he is confined; and, second, by denying him the right to apply to the Supreme Court for the writ in all cases where the District Court has, after hearing the case, remanded him into custody. Any such construction would necessarily operate to render these otherwise valuable provisions of the statute directly

subversive of the citizen's right to the writ, and hence to render the same unconstitutional and void. It goes without saying that all persons in durance vile in this state have a constitutional right to invoke the original jurisdiction of this Court to issue and hear the writ of habeas corpus; nor can the legislature by any enactment wholly deprive this Court of such original jurisdiction in any case. Section 87 of the state constitution especially confers the power upon this Court to issue the writ of habeas corpus. In doing so this Court exercises original, and not appellate, jurisdiction. But we think the restrictions of the statute, when liberally construed, are not repugnant to the constitution of the state. It is true that a provision that deprives all District Courts within the state of the right to issue the writ, except that court in whose district the petitioner is confined, is highly restrictive in its nature; but we think that the same is perhaps a reasonable restriction upon the exercise of a constitutional right, and that seems to be the prevailing judicial view of the question. See cases supra. Upon this feature, see especially In re Doll, 47 Minn. 518, 50 N. W. Rep. 607. Under the restrictions of the statute, but one District Court, or the judge thereof, can take the initial jurisdiction, *i. e.* that in which the petitioner is confined; but it is well settled that regulative restrictions of the constitutional privileges of the writ must receive a liberal interpretation at the hands of the courts, with a view of giving the petitioner the full benefits of his constitutional right to the writ. This rule, we think, would permit a petitioner to apply to the judge of an adjoining district to that in which he is confined, under the circumstances stated in the statute. See section 5179, Rev. Codes. Such a construction would manifestly be favorable to the liberty of the citizen, and would also enlarge the privileges of the writ of habeas corpus which consideration is always kept in view.

In the case at bar, and in all cases where the petitioner, on application to the District Court, has been remanded to prison, we are of the opinion that the constitutional right of the prisoner to the writ is not exhausted by the first remanding order, and that thereafter the petitioner may present his application to this Court, and state therein the fact that he has been remanded to prison by the District Court. This statement would show that no District Court, or judge thereof, without the intervention of this Court, would be capable of further acting in petitioner's behalf; and this, we think, under a liberal construction of the statute last quoted, would be sufficient. The District Court, having taken jurisdiction and fully determined the case, becomes ipso facto incapable of again acting upon the same state of facts; but this circumstance cannot conclude the petitioner. He still has in reserve his privilege at some time of invoking the original jurisdiction of this Court to determine the same matter.

We hold that no appeal will lie from a final order made in a habeas corpus case, under existing statutes. Whether the legisla-

ture should provide for such appeal as a cumulative remedy is a question of legislative discretion, but we are clear that no legislation can wholly deprive this Court of its right to issue the "liberty writ" in the exercise of its original jurisdiction. The appeal is dismissed.

YOUNG, J., concurring.

BARTHOLOMEW, C. J. (dissenting). I regret that I am unable to agree with my associates in this case. The results that follow from their conclusions are, I believe, more desirable than the results that follow my own conclusions; and I would gladly subscribe to their views, did I not think that the legislation of this state imperatively forbids it. The matter is of so much importance that I deem it my duty to express my views by something further than a formal dissent.

We may start with the general propositions that originally a party who deemed himself unlawfully deprived of his liberty had the right to have the legality of his confinement passed upon by every court in the realm. If remanded by one court, he was at full liberty to petition another, and he could continue this process as long as he could find a court to which to apply. Under this practice the petitioner never asked for an appeal or review in any form. He had a speedier means of reaching the same result. If discharged by any one of the numerous courts to which he could apply, such discharge was, from the origin of the writ, held final. The crown could not appeal, any more than it could when a prisoner was discharged by the verdict of a jury. Hence a review was unknown in habeas corpus cases, and this, too, at a time when a review, if obtained at all, would have been obtained by a writ of error, which is a writ of right, and not an appeal, which is the creature of statute. But this fact, standing alone, establishes nothing. It does not show that a writ of error might or might not have been granted. I have found no English case where the writ has been refused. In the celebrated case of Ashby and White, reported in 14 Howell, St. Tr. 695-888, the matter was discussed at great length. This was in 1704-05, being in Queen Anne's reign. Certain parties had been imprisoned by order of the house of commons for an alleged violation of the privileges of the house. They petitioned the Court of Queen's Bench for a writ of habeas corpus, but on the hearing they were remanded. They then sought by writ of error to bring the matter before the queen in parliament. The house of commons and the house of lords were in direct opposition on the point. Conferences were had, and exhaustive discussions; the commons being determined to keep the parties in confinement. It put forth the argument that the fact that no writ had ever been granted to review habeas corpus proceedings was evidence that none was allowable. In the end the commons petitioned the queen not to grant the writ, while the lords issued an address to the queen, the logic of which never has been, and never can be, answered, in which they urged the immediate issuance of the writ. The queen replied

the same day, saying: "My Lords: I should have granted the writ of error desired in this address; but finding an absolute necessity of putting an immediate end to this session, I am sensible there could have been no further proceeding upon that matter." She forthwith prorogued parliament, and thus, of course, put an end to the imprisonment. There are some dicta in the early English cases to the effect that the writ of error will not lie in habeas corpus cases. City of London, 8 Coke, 121b; *Rex* v. *Trinity Chapel,* 8 Mod. 27. But in these cases, and all others where I find the point mentioned, procedendo, mandamus, and habeas corpus are classed together, and practically for the same reasons, as proceedings that cannot be reviewed by writ of error. But no decision in England has held directly that a writ of error would not lie to review proceedings on habeas corpus, while the house of lords has declared that the writ would lie. In the case of *Yates* v. *People,* 6 Johns. 337-523, it was held (not upon any statute, but purely upon common law grounds) that a writ of error would lie from the court for the correction of errors to the Supreme Court, to review a decision of the latter court in habeas corpus proceedings. This case is very exhaustive. I think I am justified in saying that it involved more research and labor than have been bestowed upon all the cases in the books where the right to review by writ of error or appeal has been denied in habeas corpus cases. True, there was a diversity of opinion in that case, and that diversity continued until the matter was finally settled in New York by express statute giving the right of appeal. Another case decided upon the same grounds and in the same way is Ex parte Lafonta, 2 Rob. (La.) 495. Another full discussion of this question may be found in *Holmes* v. *Jennison,* 14 Pet. 540. I cite these cases simply to show that it has never been the settled law that proceedings upon habeas corpus could not be reviewed by a higher court.

It is true that in this state the writ of error is abolished, and all reviews are by appeal, as provided by statute. The majority opinion cites certain cases to show that, under a general statute allowing appeals from all final judgments, appeals are not allowed in habeas corpus cases. The first case is *Howe* v. *State,* 9 Mo. 690. There the Circuit Court had refused to discharge petitioner, and he appealed. The appeal was dismissed on the ground that the decision was not final, because the petitioner could make another original application to another circuit judge, or justice of the County Court, or justice of the Supreme Court. What that court would have held, had petitioner been discharged, and the state appealed, does not appear. Certainly the judgment would have been final in that case. But as to whether or not an order remanding a prisoner is a final judgment, within the meaning of appeal statutes, seen the opinion of Chief Justice Taney in *Holmes* v. *Jennison,* supra. In Ex parte Jilz, 64 Mo. 205, no question of a right of appeal was involved. That was an original application to the Supreme Court for a writ of habeas corpus. What the Court did hold

was that where the petitioner was discharged the matter became res adjudicata. It is difficult to state the precise condition of the law on this point in Michigan. The majority opinion cites the case of *People* v. *Conant*, 59 Mich. 565, 26 N. W. Rep. 768; and the case holds that the discharge of a party, held upon a criminal charge, on habeas corpus proceedings, is not reviewable on writ of error. *People* v. *Fairman*, 59 Mich. 568, 26 N. W. Rep. 769, is a stronger case on the same point, as that case holds that a writ of error does not lie at common law to review habeas corpus proceedings. In *People* v. *Judge of Calhoun Circuit Court*, 30 Mich. 266, it was held that a writ of error would not issue to review habeas corpus proceedings before a judge at chambers, for the reason that such proceedings were not according to the course of the common law, and it was held that the proper remedy for errors committel in such proceedings was by certiorari. In re Hicks, 20 Mich. 133, the Court said: "They (the petitioners) insist that the decision of the court below on the habeas corpus, and the discharge of the parties, is final, and not reviewable in any form. We cannot accede to this view. The constitution has vested this Court with a general superintending control over all inferior courts, and has clothed it with power to issue writs of error, habeas corpus, and other original and remedial writs; and we cannot doubt our authority to review by some mode a decision on habeas corpus, when made by a circuit judge." It would appear that in that state the right to review the proceedings in some manner is unquestioned, except in the single case of the discharge of a person held upon a criminal charge. Other considerations enter into such a case, that I need not stop to discuss. Nor do I think the majority opinion at all strengthened by the citations from Wisconsin. It is true that our general appeal law in civil cases is the same as that of Wisconsin, and it is also true that in that state habeas corpus proceedings are reviewed, not under the appeal law, but by writ of error, and that is because in that state habeas corpus proceedings are classed as criminal in their nature; and in the case cited (*State* v. *Grottkau*, 73 Wis. 589, 41 N. W. Rep. 80, 1063) a writ of error was refused to the state because the Court had held in *State* v. *Kemp*, 17 Wis. 669,—and the ruling had never been questioned or doubted,—that a writ of error would not lie at the suit of the state to reverse a judgment for the defendant in a criminal prosecution; and the Court entered into an extended argument to show that a judgment of discharge on habeas corpus, where the petitioner was charged with a crime, was in no manner different in character.

These are all the cases cited by my associates to establish the proposition that appeals in habeas corpus cases are not permitted under general appeal laws. I submit that only in part do these cases support the proposition. In so far as they do support it, they are based upon statutes that permit appeals from final judgments only.

Hurd, Hab. Corp. § 573, states that, by the current of state authority, decisions in habeas corpus refusing a discharge are not final, but the party may apply to successive courts; and the reason that he assigns is that no appeal or writ of error lies from such decisions, and he cites the cases to support the position. When we turn to the cases that deny an appeal or writ of error, we find that the reason assigned is that the decision is not final as the petitioner may renew his application. See *Howe* v. *State*, supra; *Hammond* v. *People*, 32 Ill. 446; Ex parte Thompson, 93 Ill. 89. Thus, the reasoning moves ever in a circle. It is not strange that legislatures and courts should break away from it. Again, under the old practice as stated in *Howe* v. *State* it might happen that a party would make his application to the Supreme Court of the state, and on the hearing be remanded, but upon a renewed application before a justice of the County Court he might be discharged. The discharge would be final, and the Supreme Court would be effectually reversed by the County Court. Enlightened judicature can hardly tolerate such a farce, even in the interests of the great personal liberty writ. As a result the trend of legislation is to limit the applications for the writ so that it may not be abused, and at the same time give the right of appeal. Not only has this been done in New York, but also in federal legislation giving the absolute right of appeal in habeas corpus cases from the District to the Circuit Courts, and from the Circuit to the Supreme Court; also, from territorial Supreme Courts to federal Supreme Court, and from Supreme Court, District of Columbia, to United States Supreme Court. See Rev. St. U. S. §§ 763, 764, 1909; also, Act March 3, 1885; also, *Roberts* v. *Reilly*, 116 U. S. 80, 6 Sup. Ct. 291; In re Sun Hung, 24 Fed. Rep. 723; Wildenhus' case, 120 U. S. 1, 7 Sup. Ct. 385. The appeal is also given in Iowa. Code, § 4101. In Vermont, habeas corpus proceedings are reviewed on exceptions under the general law. In re Cooper, 32 Vt. 253. In West Virginia, on writ of error under the general law. Ex parte Mooney, 26 W. Va. 32. In Washington, under the general appeal law. See annotations to section 732, 2 Hill's Code. In Indiana. under the general appeal law. *State* v. *Banks*, 25 Ind. 495.

It is conceded by the majority opinion that in Minnesota and South Dakota, under statutes identical with ours, appeals in habeas corpus are allowed under the general appeal law. But the majority opinion proceeds to argue with much ability and ingenuity, that those cases were improperly decided, under the statutes. From that view I dissent, and this brings us to a more specific examination of our statutes. Section 5156, Rev. Codes, reads, "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense." The next section reads, "Every other remedy is a special proceeding." It is not possible to misunderstand that language. Every remedy is either a civil action, a criminal action, or a special

proceeding. A habeas corpus proceeding is a remedy. If it be a civil or criminal action, then, beyond question, it is appealable. If it be a special proceeding, then it comes directly within section 5626, Rev. Codes, which declares what orders are reviewable upon appeal, and the second subdivision of which reads, "A final order affecting a substantial right made in special proceedings." In my judgment, that exactly covers this case. But the majority opinion argues that it is not a special proceeding, because it is not placed in the Codes with certain other enumerated special proceedings of a purely civil nature, but, on the other hand, it is placed in the Code of Criminal Precedure. I find no force in the argument. The statute does not declare that special proceedings must be of a civil nature. It says, "Every other remedy is a special proceeding." I regard habeas corpus as more nearly of a civil than of a criminal character, yet, doubtless, the legislature, in placing it among the criminal procedure, regarded it as partaking of that character. As we have seen, it is so regarded in Wisconsin, and the same is true in Indiana. *Milligan* v. *State,* 97 Ind. 355. And in Kansas. *Gleason* v. *Commissioners,* 30 Kan. 53, 1 Pac. Rep. 384. And in Illinois. *Angell* v. *Union Co.,* 8 Ill. App. 244. But the location of the habeas corpus act can in no manner alter its inherent character. It is urged that this Court has held that there are remedies that are neither actions nor special proceedings. The first case cited is *State* v. *Davis,* 2 N. D. 461, 51 N. W. Rep. 942. There we simply held that the proceeding under review was not a remedy, and could not possibly, in that case, be used as a remedy, and hence was not a special proceeding, under the express definition in the statute. The second case is *Myrick* v. *McCabe,* 5 N. D. 422, 67 N. W. Rep. 143. It was a proceeding to remove from office. The syllabus in that case, prepared by Chief Justice Wallin, after citing the section authorizing the proceeding, declares: "Said section creates a remedy, and authorizes a proceeding which is summary in its nature, and of a character peculiar to itself. The statute which creates the remedy also establishes the practice which governs the proceeding to obtain the remedy. The statute does not contemplate that the proceeding shall be delayed by appeals from intermediate orders or rulings, and does not authorize any appeal before the entry of judgment." Certainly that case did not hold that the remedy was neither an action nor a special proceeding. The last case is In re Eaton, 7 N. D. 269, 74 N. W. Rep. 870. The case supports the proposition of the majority to some extent. The case was disbarment of an attorney, and resulted in the exoneration of the accused. The decision was written upon his application for judgment for costs. A provision of law allowed costs in special proceedings. If costs were allowed in that case, they could be taxed only against certain attorneys, who formulated the charges and conducted the proceedings, not of their own volition, but by express appointment and order of the District Court. To have mulcted them in costs would have been exceedingly inequitable and

unjust. To avoid a result so deplorable, we considered the proceeding so far sui generis that we excluded it from the classification of special proceedings. But certainly it would be entirely subversive of the statute to extend the reasoning of that case to habeas corpus proceedings.

But my associates base their ruling largely upon our habeas corpus statute, which they assert authorizes an application to this Court for the writ of habeas corpus after the writ has been issued by the District Court, a hearing had, and the petitioner remanded; thus enabling the petitioner to obtain in a speedy manner and without the necessity of an appeal, with its delays, the judgment of this Court upon the merits of his case. Here we diametrically differ. Section 8651, Rev. Codes, as amended by chapter 85, Laws 1897, reads: "The writ of habeas corpus must be granted, issued, and made returnable as hereinafter stated: (1) The writ must be granted by the Supreme Court or any judge thereof upon petition by or on behalf of any person restrained of his liberty within this state. When granted by the Court it shall in all cases be issued out of and under the seal of the Supreme Court, and may be made returnable, either before the Supreme Court, or before the District Court or any judge of the District Court. (2) The writ may be granted, issued, and determined by the District Courts and the judges thereof upon petition by or on behalf of any person restrained of his liberty in their respective districts. When application is made to the Supreme Court, or to a judge thereof, proof by the oath of the person applying or other sufficient evidence shall be required that the judge of the District Court having jurisdiction by the provisions of subdivision 2 of this section is absent from his district or has refused to grant such writ, or for some cause to be specially set forth is incapable of acting, and if such proof is not produced the application shall be denied." That this section is an innovation, and intended as an innovation, upon the old practice is too clear for question. It strikes at once at the matter of repeated applications to courts of equal authority. A District Court, or the judge thereof, can only grant, issue, and determine the writ upon the petition of a party confined in that particular district. No other District Court or judge has any jurisdiction. So much is conceded in the majority opinion. But neither can a party come to this Court in the first instance as a matter of course. Certain facts must be shown. The judge of the District Court of the district where the petitioner is confined must be absent, or must refuse to act, or, for some cause to be specially set forth, must be incapable of acting. What incapacitates a judge? Sickness, consanguinity, affinity, or such personal interest in the result as makes it improper for him to act. These have always been held to disqualify. But the majority would ingraft another disqualification. They say, in effect, that the petitioner must show to this Court that the judge of the proper District Court is absent, or has refused to act, or has acted. I humbly submit that the statute will bear no such con-

struction. Its every word presupposes that there has been no action in the District Court when the party comes to this Court, and that there can be no action there. Let me accept the construction of the majority for a moment, and see where it will lead. Let us suppose that a party confined in the first district presents his petition for a writ of habeas corpus to the Court in that district, and that the writ is granted, the matter heard, and the petitioner remanded. Now, under the holding of the majority, the petitioner can come to this Court with his petition, and an affidavit showing that the judge of the first district is incapable of acting because he has acted, and this Court must then issue another writ; and, as it may be made returnable before any District Court in the state, this Court will send it to the District Court for the second district. That court, in turn, remands the party. Upon the same showing he can come before us again, and obtain another writ, and continue the process until all the District Courts are exhausted; and this in the teeth of the statute, which it is admitted was passed expressly to prevent repeated hearings in the District Courts. I am entirely unwilling to prevert language from what seems to me its plain meaning, when it leads to such groesque results. But it is said that, if there be an appeal for one party, there must be an appeal for both, and that an appeal by the state acts as a supersedeas, and would prevent the execution of the order of discharge, and that this cannot be true, because a section of the habeas corpus act makes it an offense to rearrest a party who has once been discharged on habeas corpus. This argument is based upon a misapprehension of conditions. If the party has been discharged, then the appeal by the state cannot supersede the order. No appeal and no bond can supersede an order or judgment that has been fully executed. An appeal cannot incarcerate a man who is free. It can only prevent a man who is incarcerated from going free. But it is urged that even this enables the state, by taking an appeal before the order of discharge is promulgated, to defeat the purposes of the writ, and hold a party in confinement during a tedious appeal. If this be true, it is a practical objection to my position. I freely admit it, but I do not admit that it is a legal objection. Men find themselves grievously injured by the delays of litigation every day. But I do not concede this to be true. In Iowa, under an express statute giving an appeal to both parties in habeas corpus proceedings, the Supreme Court holds that the order of discharge cannot be superseded. This is in line with the general provisions which will not allow an appeal by the state in criminal proceedings to supersede a release or an acquittal by a Court or jury. Should such a case ever come before us, it might be our duty, in the interests of personal liberty, to hold that an appeal by the state did not supersede an order of discharge.

If it be claimed that my construction of the statute renders it unconstitutional, as unduly infringing upon the powers given to this Court to issue writs of habeas corpus, I answer that, while it is

entirely competent for the legislature to regulate and prescribe constitutional powers thus conferred, yet that question is not before us in this case, and cannot be. We are concerned with the appeal statute, and with this only as it bears upon that. I simply contend that, under our statutes as they stand, a party who has been remanded upon habeas corpus proceedings has a right to appeal to this Court.

(77 N. W. Rep. 617.)

JAMES B. RADFORD *v.s.* ABRAHAM B. JOHNSON.

Opinion filed November 29, 1898.

Disputed Boundaries—Government Stakes.

In cases of disputed boundaries the point marked by the original stakes and monuments placed by the government surveyors, if they can be found, or the place where they were identified, govern.

Evidence of Location of Corner Stakes.

Bounds and starting points are questions of fact to be determined by evidence as in other cases.

Instruction Invading Province of Jury.

Under the facts in this case, an instruction to the jury that "the line as fixed by the surveyor at this time is presumptively correct," cannot be upheld under section 2028, Rev. Codes, and constitutes reversible error.

Surveyors Lines Presumption of Accuracy.

Held, further, that the presumption of accuracy given to the surveys of a county surveyor by section 2028, Rev. Codes, refers to such surveys as are made in conformity to the requirements of that and the succeeding sections. Further, that such presumption of accuracy refers to his measurements and computations, and such other acts as are done pursuant to an exact science, or as are expressly provided for by statute, including field notes and plats, but does not extend to a determination of disputed starting points or boundaries.

Appeal from District Court, Cass County; *Pollock*, J.

Action by James B. Badford against Abraham B. Johnson. Judgment for plaintiff. Defendant appeals.

Reversed.

Morrill & Engerud, for appellant.

Newman, Spalding & Stambaugh, for respondent.

YOUNG, J. The parties to this action own adjoining farms, both situate in the same section, plaintiff's being the southwest quarter and defendant's the southeast quarter. The real dispute is as to the proper location of the boundary line dividing their farms. The tract in controversy consists of a narrow strip about 19 feet wide, and in quantity about one-half acre. Both parties agree upon the

location of the original government corners marking the four corners of the section in which their land is located. Plaintiff fixes the beginning of the dividing line between them at a point on the south section line equidistant from the southeast and southwest corners of said section. The defendant, on the other hand, contends that the true line begins at a point on the south section line, about 19 feet west of the equidistant point where he undertakes to identify the location of the original quarter section corner established by the government surveyors. The plaintiff, alleging ownership in himself, sues defendant for damages for trespassing upon this tract. Defendant answers, likewise asserting ownership, and counterclaims for damages for alleged trespass. The jury returned a verdict for plaintiff. Defendant filed exceptions to the Court's charge, which, together with the refusal of certain requests, all of which are embodied in a settled statement of the case, he now urges as errors upon his appeal from the judgment. At the trial plaintiff rested his case for support upon the oral evidence of the county surveyor of Cass county, whose testimony, so far as it goes to aid in determining the proper location of this disputed line, and after satisfactorily identifying the section corners, which we have observed were not in dispute, is all contained in the following language: "I then placed a stake on the south section line half way between the southeast and southwest corners. * * * I did not find any quarter stake on the south line of the section." The defendant offered evidence tending to establish the exact location of the original quarter section corner. Defendant requested the following instruction: "The best evidence of the quarter section line between the lands in controversy is the original quarter section post or mound as placed there by the United States surveyors. The mark governs whether the survey was right or wrong. Hence, if you believe from the evidence that the quarter section post or mound was in existance, and was located where the defendant claims it was, then you must be governed by that line in deciding the controversy." The refusal of the foregoing is assigned as error. To this we cannot agree. The Court did charge as follows: "Now it is conceded that the land on both sides of this line originally came from the United States government, and I charge you, gentlemen of the jury, as the law of this case, that in a resurvey of the land which originally belonged to the United States, and which it has caused to be surveyed under its authority, such resurvey must conform to the survey made under the authority of the government, if the mounds and corners of the original government survey can be identified. If the stakes and monuments placed by the government in making the survey to indicate the section corners and quarter section posts can be found, or the places where they were originally placed can be identified, they are to control in all cases. Further, the corners established by the original surveyors under the authority of the United States cannot be altered. Whether properly placed or not, no error in placing them can be corrected by any surveyor deriving

his authority from the laws of the state." Not only does that portion of the charge given and just quoted contain the substance of defendant's request, but as a correct statement of well-settled law it has our approval, and requires no citation of authority to support it.

The following was also excepted to: "The question of fact then, gentlemen of the jury, to be submitted to you is as to where the line between these two contending parties rest, bearing in mind that the line as fixed by the surveyor at this time is presumptively correct, and the burden of proof falls on the defendant to show that it is incorrect, and not according to the government survey." Herein the Court erred. The correctness of the line fixed by the county surveyor, so far as it was based upon courses and distances, and in the absence of the original quarter section corner, was not in dispute. The real issue was the existence or nonexistence of the original quarter section corner. This was a pure question of fact for the jury, and upon its determination on that one point confessedly the one party or the other would prevail on the question of ownership of the tract in dispute. By the instruction given, the jury were directed, in effect, not to weigh his evidence for what it was worth to aid them in determining the point in issue,—that is, the location of the disputed corner and line,—but to take his determination on that point as presumptively correct. This was wrong. We refer to his testimony in the language of the South Dakota Supreme Court in *Arneson* v. *Spawn*, 49 N. W. Rep. 1066, a similar case: "It was simply the evidence of a witness. Its probative value was not fixed by the law, as in the case of his official return, but went to the jury, like any other evidence." It is well settled that bounds and starting points are questions of fact to be determined by testimony, and surveyors have no more authority than other men to determine them upon their own notions. *Cronin* v. *Gore*, 38 Mich. 381; *Case* v. *Trapp*, 49 Mich. 59, 12 N. W. Rep. 908. Campbell, J., speaking for that Court in *Stewart* v. *Carlton*, 31 Mich. 269, said: "It appears to have been supposed that surveyors are competent not only to testify to measurments and distances, but also to pass judgment themselves, and on information of their own choosing, upon the position of lines and starting points. * * * This is a very dangerous error. The law recognizes them as useful assistants in doing the mechanical work of measurement and calculation, and it also allows such credit to their judgment as belongs to any experience which may give it value in cases where better means of information do not exist. But the determination of facts belongs exclusively to Courts and juries. Where a section line or other starting point actually exists is always a question of fact, and not of theory, and cannot be left to the opinion of an expert for final decision." The same judge, in the later case of *Gregory v. Knight*, 50 Mich. 61, 14 N. W. Rep. 700, expressed himself in language equally strong: "No one can be disturbed in his estate without the right to have his rights determined by legal process. * * *

The law does not contemplate any such absurdity as the submission of question of title to land to anything but the judicial courts. It is quite manifest that in this case there seems to have been an idea that the exparte action of surveyors and commissioners was entitled to credence and authority upon the true lines and the facts of encroachment. Neither of them can affect vested rights or settled controversies. They may be useful witnesses when they speak of matters with which they are familiar, but they have no greater weight than any one else to determine starting points or boundaries." The trial court without doubt was led to give the instruction complained of by the language found in section 2028, Rev. Codes, which after generally providing for whom and in what manner county surveyors shall make surveys, adds that "his surveys shall be held as presumptively correct." The instruction complained of cannot be upheld in this case by the statute referred to for three reasons: First. It does not appear that the survey relied upon was made in conformity to the requirements of sections 2028-2034, Rev. Codes, inclusive, which provide for the making of field notes and plats, and what they shall contain; also for transcribing them into record books, if the county commissioners shall so require, as well as other matters of detail and for guidance. This is necessary, in our judgment, before the survey of a county surveyor as such becomes presumptively correct under the statute. In holding this view we agree with the interpretation placed upon the same statute in *Arneson* v. *Spawn* (S. D.) 49 N. W. Rep. 1066, wherein the Court said: "When section 689 (our section 2028) says, 'and his survey shall be held presumptively correct,' we think it means his surveys made, authenticated, and proved as provided by the statute." Second. The instruction given made the line established, and not the survey made, presumptively correct. The survey, so far as it related to courses, distances, and measurements, was not in dispute. The line was. The instruction not only gave undue weight to his testimony, which was relatively unimportant on the questions at issue, but gave not to his evidence alone, but to his determination of the line itself, the presumption of accuracy. See *Cockrell* v. *McGuinn,* 4 T. B. Mon. 61; *Ott* v. *Soulard,* 9 Mo. 339; *Robinson* v. *White,* 42 Me. 209. Finally, we are of the opinion that the presumption of correctness which is extended to a survey made by a county surveyor under section 2028, Rev. Codes, refers not only to an official survey, in the sense of being made in compliance with the statute, but means courses, distances, variations, mathematical computation, and such acts as are done pursuant to the methods of an exact science, or as are provided for in the sections referred to, including field notes and plats, but does not include a determination of disputed boundaries or corners. The last, as already noticed, belongs to the courts. Others errors are urged. No useful purpose will be served by discussing them. That already considered is controlling. The judgment of the lower court is reversed, and a new trial granted. All concurr.

(77 N. W. Rep. 601.)

WILLIAM JAMES, *et al.*, *vs.* ROBERT WILSON, *et al.*

Opinion filed December 2, 1898.

Claim and Delivery—Action by Chattel Mortgagee—Defenses.

In an action of claim and delivery for the unlawful detention of chattels,—which is an action in the nature of replevin in the detinet,—the defendant is permitted under a general denial to show by way of defense a right of possession superior to that of the plaintiff, either in himself or another, even if a stranger to the action; but such right of possession must be an absolute right, and not one dependent upon circumstances or conditions. Accordingly *held*, where such action was brought by a second mortgagee against the mortgagor for the possession of goods and chattels covered by the mortgage, the mortgagor cannot show in his defense that there is a prior outstanding and unpaid chattel mortgage upon the same property described in the plaintiff's mortgage, there being no evidence that the owner of the prior mortgage ever demanded possession of the property in question.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by William James and Benjamin James against Robert Wilson and Jane Wilson to recover possession of personal property upon which plaintiffs held two chattel mortgages given by defendants. Verdict by direction of Court and judgment thereon for defendants. Plaintiffs appeal.

Reversed.

Young & Burke, for appellants.

The second mortgagee is entitled to the possession of the mortgaged property upon default in the payment of his notes, against all the world except the first mortgagee or persons holding the first mortgage notes. Cobbey on Chat. Morts. § 1043; Boone on Morts. § 262; Jones on Chat. Morts. § 497. Tender of the amount secured by a mortgage releases the property from the lien. *Corbitt* v. *Heisty*, 15 Ia. 296; *Tompkins* v. *Bates*, 7 N. W. Rep. 163; *Knox* v. *Williams*, 39 N. W. Rep. 786; *Hall* v. *Godfrey*, 47 N. W. Rep. 851; *Moore* v. *Norman*, 45 N. W. Rep. 857; *Flanders* v. *Chambers*, 24 Mich. 305; *Lucking* v. *Wesson*, 25 Mich. 443. The second mortgagee may pay off the first mortgage indebtedness and be subrogated to all rights under first mortgage. *Farrington* v. *Bristol*, 35 Mich. 28. A condition does not invalidate a tender if it is one the law would otherwise impose. *Halpin* v. *Phoenix Ins. Co.*, 118 N. Y. 165; *Newman* v. *Tymeson*, 13 Wis. 191. A defendant in replevin will not be entitled to a judgment for a return, by showing property in a stranger, unless he connects himself with the stranger's title so as to show paramount right of possession. *Rogers* v. *Arnold*, 12 Wend. 30; *Hoyt* v. *Van Alstyne*, 15 Barb. 572; *Gardner's Adm'r* v. *Morrison*, 12 Ala. 547; *Gerber* v. *Mouie*, 56 Barb. 652; *White* v. *Webb*, 15 Conn. 302; *Van Namme* v. *Bradley*, 69 Ill. 299; *Adams* v. *Wilde*, 107 Mass. 123; *Simpson* v. *Warren*, 50 Ill. 222; *Brusley* v. *Hamilton*, 15 Pick. 40; *Rankin*

v. *Greer,* 38 Kan. 343. The same rule obtains in actions of trover. *O'Brien* v. *Helburn,* 22 Tex. 617; *Davis* v. *Loften,* 6 Tex. 489; *Burns* v. *Lidwell,* 6 Mo. App. 192; *Johnson* v. *Carnley,* 10 N. Y. 570; *Stowell* v. *Otis,* 71 N. Y. 36. The Court erred in admitting evidence of title in third person, it was not within the issues. *McMillan* v. *Actchison,* 3 N. D. 183; *Stowell* v. *Otis,* 71 N. Y. 36. It was error for the Court to direct a verdict for defendants. *Slattery* v. *Donnelly,* 1 N. D. 264; *Pirie* v. *Gillitt,* 2 N. D. 255.

John D. Stack, for respondent.

Right of possession in a third person is a good defense in replevin in the detinet and the person pleading it need not connect himself with such third person's title. Plaintiff must recover on the strength of his own title. *Plano Mfg. Co.* v. *Daley,* 6 N. D. 330, 70 N. W. Rep. 277; *Russell & Co.* v. *Amundson,* 4 N. D. 112; *Pitts & Co.* v. *Young,* 6 S. D. 557, 62 N. W. Rep. 432; *Fuller* v. *Brownell,* 67 N. W. Rep. 6; *Griffin* v. *Long Island R. Co.,* 101 N. Y. 348; *Kennedy* v. *Shaw,* 38 Ind. 474; *Connor* v. *Knott,* 8 S. D. 307, 66 N. W. Rep. 461. The verdict was properly directed for defendants because the complaint did not state a cause of action in this that the facts showing plaintiffs special property or lien were not specially pleaded. *Donovan* v. *St. A. & D. Elev. Co.,* 7 N. D. 513, 75 N. W. Rep. 809; *Madison Nat. Bank* v. *Farmer,* 5 Dak. 282, 40 N. W. Rep. 345; *First Nat. Bank* v. *North,* 2 S. D. 480, 51 N. W. Rep. 96; *Thompson* v. *Nichols,* 72 N. W. Rep. 217; *Garber* v. *Palmer,* 66 N. W. Rep. 656; *Camp* v. *Pollock,* 64 N. W. Rep. 231. The abstract does not show sufficient evidence to sustain appellants' contention. *Ashe* v. *Beasley,* 6 N. D. 191. The chattel mortgages of plaintiffs were not properly proved so as to be received in evidence. *Brynjolfson* v. *N. W. Elev. Co.,* 6 N. D. 450. Both parties asked for a directed verdict, thus waiving the right to have disputed questions of fact submitted to the jury. *N. E. Mtge. Scty. Co.* v. *Great Western Elev. Co.,* 6 N. D. 407. Neither did appellants ask to submit any disputed question of fact to the jury. *Stanford* v. *McGill,* 6 N. D. 536.

WALLIN, J. This action was brought to recover the possession of personal property, consisting of wheat, oats, and barley, and certain farm machinery. Plaintiffs claim the right of possession under two chattel mortgages covering said property, executed by the defendant Robert Wilson, and delivered to the plaintiffs to secure certain promissory notes described in the mortgages. It is conceded that the notes were due and unpaid when this action was commenced, and both of the notes and mortgages were put in evidence without objection. It was expressly conceded by the defendants' counsel at the trial that the plaintiffs were entitled to the possession of said farm machinery, and, on the other hand, it was practically conceded by the plaintiffs' counsel that under the evi-

dence the mortgages of the plaintiffs did not cover the oats and barley. At the close of the case the trial court directed a verdict in favor of the defendants as follows: "The Court directs you that your verdict will be for the defendants, Robert Wilson and Jane Wilson, in this action, for the possession of the wheat, oats, and barley described in the complaint; and, in case a return thereof cannot be had for the value thereof, the value to be fixed by you under the evidence given here in court. The amount will be shown by the papers, and I think is undisputed. You will arrive at the value from the evidence given by the witnesses here in court." Pursuant to this direction of the trial court, the jury returned a verdict for the value of said grain, aggregating $344.58. The defendants' answer was amended at the trial, and, as amended, embodied a general denial, and also set out the following as a special defense: "Third. That the right to the possession of all the crops mentioned in the complaint was at the time of the commencement of this action, and at all times since and prior thereto, in one Mary Simmons, and not in these plaintiffs, or either of them." In support of this special defense the defendants offered testimony tending to show that the defendants had, long prior to the execution of the two chattel mortgages of the plaintiffs, made and delivered two other chattel mortgages to secure the defendants' obligations, and that the same had been properly filed, and were due and outstanding mortgages, and that the same were unpaid at the time this action was commenced, and were then owned by the said Mary Simmons. The fact that said prior mortgages were executed and delivered is conceded by the plaintiffs' counsel, but plaintiffs' counsel strenuously contends that the evidence shows that one of said mortgages was paid prior to the commencement of this action, and that the other had ceased to be a lien, for the reason that payment thereof had been tendered prior to the commencement of this action, and that said tender had been kept good. The two prior mortgages and the notes secured thereby were put in evidence by the defense against the plaintiffs' objections, and this ruling is assigned as error in this Court. This evidence was objected to on various grounds, only one of which need be referred to, viz: that such evidence was incompetent, irrelevant, and immaterial, and does not tend in any way to disprove plaintiffs' right to the possession of the property described in the complaint. As we have determined that this objection is vital, and must be sustained, it need not be decided in this case whether the prior mortgages had or had not been paid or legally discharged at any time prior to the commencement of this action or at all; and we shall assume for the purposes of this decision that the mortgages were due and unpaid, and were the property of Mary Simmons when the action began. The action being in the nature of replevin in the detinet, it was competent for defendants to show, when the action was commenced, either that the defendants were lawfully entitled to the possession of the property, or that some person other than the defendants had the right of

possession as against the plaintiffs. This rule has become elementary, and hence citations in its support are unnecessary; but see *Griffin* v. *Railroad Co.*, 101 N. Y. 348, 4 N. E. Rep. 740, for an exposition of the rule. As against the plaintiffs' right of possession, the defendants cannot rely upon their general ownership of the property in question, inasmuch as it is undisputed that the debts secured by plaintiffs' mortgage were due and not paid when the action began. So far as appears by the record, the only defense attempted to be interposed at the trial to plaintiffs' right of possession under their mortgages was the attempt to show that Mary Simmons, under and by virture of said prior chattel mortgages, had a right of possession as against the plaintiffs. No evidence was offered tending to show that Mary Simmons had ever demanded the possession of the property in question, or that she intended at any time to make a demand therefor under said prior mortgages, or at all. We are of the opinion that the prior mortgages were inadmissible in evidence, for the reason that they do not show such a matured and unconditional right of possession in Mary Simmons as will defeat the plaintiffs, who have demanded possession under their mortgages and against whose right of possession no counter or superior right has ever been asserted by the owner of the prior mortgages. In this state a chattel mortgage in the usual form does not transfer title, nor does it confer the absolute right of possession, even after condition broken. Until the right is definitely asserted, and possession is demanded by the mortgagee, it is a mere lien. Rev. Codes, § § 4683, 4714. In jurisdictions where title passes by a chattel mortgage if the instrument embraces a stipulation that the mortgagor may retain possession of the property until a breach of the conditions of the mortgage has occurred, the debtor cannot, as against a plaintiff suing him in replevin, set up such mortgage as a defense, where there is no evidence that the prior mortgagee has ever made any claim under his mortgage. *Adams* v. *Wildes*, 107 Mass. 123. See, also, *Gardner's Adm'r* v. *Morrison*, 12 Ala. 547. In the case last cited the Court uses this language: "It is no objection to this conclusion that plaintiff's title is subordinate to that of the first mortgagee, and that the property may be recovered of him by the latter. This is a matter with which the defendant has no concern. The plaintiff may relieve himself from the lien of the first mortgage by purchasing it, or paying the debt for which it provides, or he may go into equity, and foreclose, giving the first mortgagee the preference in the payment of his demand. Whatever be the rights and remedies between prior and subsequent mortgagees it is unimportant to the defense set up." We regard this language as being strictly appropriate to the case at bar. In this case there is no controversy between a second and a first mortgagee. But, on the contrary, the defendants are seeking shelter under the rights of another, who has not asserted any rights as against the plaintiffs in this action, and who may never do so. The case of *Rankine* v. *Greer*, 38 Kan. 343, 16 Pac. Rep.

680, is squarely in point. In that case the Court, after fully recognizing the rule that in replevin in the detinet a defendant may show in his defense under a general denial a superior right of possession in another, even in a stranger, proceeds to say: "But this right of possession must be an absolute right; one not contingent nor dependent upon circumstances or conditions." Further on, referring to the defense of a prior outstanding chattel mortgage, the Court uses the following language: "This right of possession under a mortgage is a right to be claimed by the mortgagee. He might never claim the property; it might not be necessary for him to do so; the debt might be paid, or he might have other security or other property included in his mortgage sufficient to satisfy his claim independent of this property." Upon the reason and authority of these cases we are satisfied that the prior mortgages in question should not have been admitted in evidence, and that the trial court erred in assuming that the same constituted a defense to plaintiffs' cause of action.

Respondents' counsel argues in his brief that the chattels in question apear to be the property of the defendant Jane Wilson, and not that of her husband, Robert Wilson, who alone executed the mortgage. There is no foundation in the record for this claim. The evidence of Robert Wilson's ownership is ample and undisputed. Besides, this point does not appear to have been raised below in any manner, and it therefore cannot now be raised in this Court.

Respondents further claim that, inasmuch as the appellants' abstract fails to set out the fact that plaintiffs' two mortgages contained stipulations permitting the plaintiffs to take possession of the mortgaged property on default of payment, therefore that this Court cannot assume that the plaintiffs have shown by their evidence any right of possession. The point is purely technical, and is not supported by any contention that the mortgages in fact were devoid of the usual stipulations concerning the right of possession. The only claim is that such stipulation is not set out in the abstract. The abstract embraces a brief and condensed reference to the plaintiffs' mortgages, and shows that they were introduced in evidence, and their character and description is fully indicated by the complaint, which is set out in the abstract. True, there was a general denial in the answer, but the record shows that the mortgages were put in evidence without objection, and nothing in the case tends to show that these particular mortgages did not contain the usual stipulation concerning taking possession by default; but on the contrary, the defendants' attitude at the trial was that the plaintiffs had made out a prima facie right of possession under the mortgages, and the evidence of the defendants was offered solely to defeat the plaintiffs' prima facie case so made out. Besides, the respondents admitted in open court at the trial that the plaintiffs were entitled to the possession of part of the property described in the mortgages. This admission goes upon the theory that plaintiffs' mortgages gave them a right to take possession upon default.

Plaintiffs claim no right of possession other than that contained in their mortgages. The point not being made below, the appellants were fully justified in assuming that it would not be urged in this Court, and hence it was correct practice to omit this feature from the abstract. There is no merit in this contention. Our conclusion is that the Court erred in admitting the prior mortgages in evidence. The judgment and order refusing a new trial will be reversed.

BARTHOLOMEW, C. J., concurs.

YOUNG, J., having been of counsel, did not sit in the case.

(77 N. W. Rep. 603.)

MICHAEL PRONDZINSKI *vs.* JAMES GARBUTT.

Opinion filed December 5, 1898.

New Trial of Equity Case Tried to Jury.

Where the records of a case show that a case exclusively of equity jurisdiction has been tried as an action at law, and to a jury, this Court will sustain the order of the trial court setting aside the verdict and granting a new trial therein, regardless of the fact that no specific objection was made by either party to such method of trial.

Redemption After Time—Fraud—Relief in Equity.

Where a complaint states that the holder of a sheriff's certificate of sale of real estate by fraud and false promises prevented the owner from redeeming within the statutory period, and, in violation of his oral agreement to extend the period of redemption, took a sheriff's deed, such facts entitle the aggrieved party to relief in equity.

Involuntary Trustee.

Such facts, when established, constitute the wrongdoer an involuntary trustee, under section 4263, Rev. Codes.

Appeal from District Court, Walsh County; *Sauter*, J.

Action by Michael Prondzinski against James Garbutt. Verdict for plaintiff. From an order granting a new trial, he appeals.

Affirmed.

John H. Fraine, (*Cochrane & Corliss* of counsel), for appellant.

The right to redeem property sold on execution may be prolonged by parole agreement of the parties beyond the statutory period. *Griffin* v. *Coffey*, 50 Am. Dec. 519. It is a fraud for the purchaser to refuse to carry out his parole agreement after the redemption period has expired and equity will grant relief. *Southard* v. *Pope*, 9 B. Monroe 264; *Adams* v. *Kable*, 44 Am. Dec. 772; *Wilson* v. *Eggleston*, 27 Mich. 260; *Laing* v. *McKee*, 87 Am. Dec. 738. The statute of frauds cannot be set up as a protection to fraud. *Teague* v. *Fowler*, 56 Ind. 569; *Barnard* v. *Flynn*, 8 Ind. 204; *Leahey* v. *Leahey*, 11 Mo. App. 413; *Turner* v. *Johnson*, 95 Mo. 431; *Arnold*

v. *Cord,* 16 Ind. 177; *Kinnard* v. *Heirs,* 3 Rich. Eq. 423; *Martin* v. *Martin,* 6 B. Mon. 8. The rule that an appellate court will support an order granting a new trial more readily than one denying an application for a new trial does not apply where the ground on which the order was granted is not one involving judicial discretion but presents the naked question whether there was or was not an error in law occurring at the trial. *Braithwaite* v. *Aiken,* 2 N. D. 57, 62; *Clifford* v. *R. R. Co.,* 12 Colo. 125; *Lorenzana* v. *Camarillo,* 41 Cal. 467; *The Minnesota Thresher Mfg. Co.* v. *Lincoln,* 4 N. D. 426; *Alt.* v. *C. & N. Ry. Co.,* 57 N. W. Rep. 1126. Where no question of discretion is involved this Court will reverse the order if there was in fact no error in law occurring at the trial. It has done so in several cases. *Braithwaite* v. *Aiken,* 2 N. D. 57; *Minn. T. Mfg Co.* v. *Lincoln,* 4 N. D. 410; *Flugel* v. *Henshel,* 6 N. D. 205. A party who lulls the owner of property into a sense of security by promising him that he may have further time to redeem cannot after the time has expired use the statute of frauds as an instrument to enable him to accomplish the fraud upon the owner of the land he had in view when he made the promise. Cases in note 40 Am. Dec. 207; *Kaler* v. *Grady,* 37 S. W. Rep. 955; *Morrow* v. *Jones,* 60 N. W. Rep. 369; *Little* v. *Jones,* 19 S. W. Rep. 497; *Cox* v. *Ratcliffe,* 105 Ind. 374; *Moorman* v. *Wood,* 19 N. E. Rep. 739; *Schrooder* v. *Young,* 161 U. S. 334, 16 S. C. Rep. 512; 2 Freeman on Executions, § 316, pp. 1078, 1079. As the contract was valid and defendant broke it, plaintiff has a right of action for damages for the breach. *Kolka* v. *Jones,* 6 N. D. 461, 71 N. W. Rep. 558. Respondent cannot urge for the first time in this Court that the complaint does not aver the disposition of the land by respondent. When he made his motion to exclude evidence under the complaint, he specified the points that the agreement was not in writing and that there was no consideration for the promise alleged. By this specification of grounds he waived others. *First Nat. Bank* v. *Laughlin,* 4 N. D. 391; *Minnesota Th. Mfg Co.* v. *Lincoln,* 4 N. D. 410-426. The insufficiency of the pleading cannot be raised by a general objection to all evidence at the beginning of the trial, but when evidence on the particular point not set out in the complaint is offered it must be objected to on the specific ground that it is not within the issues. *Bowman* v. *Eppinger,* 1 N. D. 23, 44 N. W. Rep. 1000. This Court if necessary will amend the complaint to conform to the proofs. *Anderson* v. *Bank,* 5 N. D. 80, 64 N. W. Rep. 114. A party cannot wait to ascertain whether an answer will be favorable and then move to strike it out. He must object before the answer is given. 1 Thom. on Tr. § 700; *Maxwell* v. *Ry. Co.,* 85 Mo. 95. When a party is interrogated as to extra judicial statements for impeachment purposes, a foundation must be laid by calling the witness's attention to the time, place and circumstances of the statement. 1 Rice Ev. 622, 624; 29 Am. & Eng. Enc. L. 784; 10 Enc. Pl. & Pr. 282; 1 Greenl. Ev. § 462; *Aneals* v. *Peo.,* 25 N. E. Rep. 1022;

State v. *Hunsaker*, 19 Pac. Rep. 695; *Brown* v. *State*, 20 Atl. Rep. 186; *Wood River Bank* v. *Kelley*, 46 N. W. Rep. 86; *Conway* v. *Nichol*, 34 Ia. 533; *Pope* v. *Lathrop*, 46 N. E. Rep. 154; *Browning* v. *Gosnell*, 59 N. W. Rep. 340.

De Puy & De Puy (*Templeton & Rex* of counsel), for respondent.

The order granting new trial must be upheld if any of the grounds enumerated in defendant's motion were well taken. Defendant is not limited to the single ground specified in the Court's order. *Grant* v. *Moore*, 29 Cal. 644; In re Raynor, 16 Pac. Rep. 229; *Hewitt* v. *Steele*, 24 S. W. Rep. 440; *Denslow* v. *Dodendorf*, 66 N. W. Rep. 409; *Tatum* v. *Tatum*, 20 So. Rep. 341; *Knight* v. *Barnes*, 7 N. D. 591, 75 N. W. Rep. 904. The complaint does not state a cause of action and defendant's general objection to all testimony thereunder was well taken. Overruling this objection was an error of law occurring at the trial. The complaint does not aver a tender of the amount necessary to redeem, or any demand for a deed. *Nye* v. *Swan*, 49 Minn. 431; *Union Mut. Life Ins. Co.* v. *White*, 106 Ill. 67; *Underwood* v. *Ten*, 34 Pac. Rep. 1100; *Goodwine* v. *Morey*, 22 N. E. Rep. 82; *Shelley* v. *Mikkelson*, 5 N. D. 22. The rule that naming the grounds of an objection, motion or demurrer excludes all other grounds, has no application in a case where the complaint is attacked for want of sufficiency with respect to the facts alleged. *Barnet* v. *Muncie Nat. Bank*, 98 U. S. 555, 25 L. Ed. 212; *Putnam* v. *Lamphier*, 36 Cal. 151; *Pope* v. *Mfg. Co.*, 107 N. Y. 61; *Porter* v. *Booth*, 1 S. D. 558, 47 N. W. Rep. 960; *Lee* v. *Emery*, 10 Minn. 187; *Northern Trust Co.* v. *Markell*, 63 N. W. Rep. 735; *Haskell* v. *Moore*, 29 Cal. 437; § 5272 Rev. Codes; *Weltner* v. *Jacobson*, 7 N. D. 34, 73 N. W. Rep. 65. The evidence does not show a valid foreclosure of the mortgage. A deed executed in pursuance of a foreclosure by advertisement is not even prima facie evidence of title. *Grant County* v. *Col. & U. S. Mtge. Co.*, 3 S. D. 390, 53 N. W. Rep. 746. The Court charged the jury that plaintiff might recover if defendant made the promise to extend the period of redemption and took the deed. The taking of a deed by defendant would not deprive plaintiff of his right to redeem if the promise was in fact made. *Felton* v. *Smith*, 84 Ind. 485; *Union Mut. Life Ins. Co.* v. *White*, 106 Ill. 67; *Dodge* v. *Brewer*, 31 Mich. 227.

YOUNG, J. The complaint in this case in substance alleges that for some time prior to January 5, 1895, the plaintiff was the owner in fee of a certain 160 acres of land situate in Walsh county (particularly describing it); that said land was incumbered by several liens created by his grantor, one of which, being a mortgage to one W. R. Shepard, had been foreclosed by a sale of the land, and a sheriff's certificate of sale issued to said Shepard at the date of such sale, to-wit: December 30, 1893; that in March thereafter the certificate of sale was assigned to the defendant, James Garbutt;

that thereafter, and in the month of December, and within the year allowed for redemption, the plaintiff offered to pay to the defendant the amount of money required to make redemption from the foreclosure; that the defendant, with intent to defraud and deceive the plaintiff, and for the purpose of inducing the plaintiff to defer making redemption, well knowing that plaintiff relied upon his representations, promised plaintiff that he would give him further time in which to redeem, which promise was made for the purpose of deceiving plaintiff, and without intention of keeping it, and to induce plaintiff to alter his position, and to put it out of his power to redeem said land, to the end that defendant might get a sheriff's deed thereto; that plaintiff, in reliance upon such promise, allowed the period of redemption to expire; that on the 5th day of January, 1895, the defendant caused a sheriff's deed thereto to be issued to him, placing the same of record on that day, transferring the legal title to said land from plaintiff to this defendant; that the plaintiff was ready, willing, and able to pay the amount necessary to redeem said land, which was $731.35 and interest; that through such promises plaintiff was induced not to do so, but to pay his money upon other indebtedness held by the defendant; that said land was on the 30th day of December, 1894, of the the value of $4,500. To this statement of facts the plaintiff adds this prayer: "Wherefore plaintiff demands judgment against the defendant for the sum of $3,768.65, with interest thereon from the 30th day of December, 1894, together with the costs and disburements of this action." The defendant by his answer admitted the existence of the liens, the foreclosure of the mortgage, and purchase of the sheriff's certificate, and also the issuance and recording of the sheriff's deed, and that the land was of the value of $1,800, but by a denial placed all other allegations in issue. The case was tried as an action at law to a jury, and a verdict returned for the plaintiff for $2,178.45, with 7 per cent. interest from January 5, 1895. The defendant made a motion for a new trial, which was granted by the trial court. From the order setting aside the verdict and granting a new trial, plaintiff appeals.

The motion was based entirely upon errors of law, only one of which will be referred to. The Court, in its order granting the motion, used this language: "The decision of the Court herein is based solely upon the first ground specified in defendant's motion, to-wit: that the complaint does not state facts sufficient to constitute a cause of action." The abstract discloses that in fact this objection adopted by the Court as the basis of its order was made at the opening of the trial, in the form of an objection to the introduction of any testimony in the case, and after the impaneling of a jury. Treating the objection as directed to the sufficiency of the complaint to state a cause of action generally, it was not good, as we shall hereafter notice. Considering it, however, as assailing the complaint as not stating facts sufficient to constitute a cause of action at law, and bearing in mind that when made the trial was actually pro-

ceeding as an action at law, the objection should have been sustained. The complaint shows upon its fact that, through a regular process of foreclosure, the legal title to plaintiff's land passed to defendant on January 5, 1895. Plaintiff had a legal right to redeem from that foreclosure up to December 30, 1894. That right he did not exercise. For the loss which followed as a consequence of his failure to do so he seeks redress in this action. This case, in its facts, is not an isolated one, and the authorities disclose that appeals to the courts for relief in such cases have not been of unusual occurrence. So far as we are able to learn, however, redress has been sought through, and granted only by, courts of equity. The reason for this is not arbitrary, but arises from the very foundation of the right to relief. In this case, at its threshold, we are confronted with a statement of facts embracing fraud, deception and false promises, set out and urged to defeat the effect of the sheriff's deed issued regularly and in due course to the defendant, which deed, if it is unassailed or unassailable, determines the rights and relation of the parties as to this land. These facts so urged address themselves peculiarly and exclusively to a court of equity, and invoke the power of that court to extend complete relief. The power of courts of equity to give relief in this class of cases has not only been generally recognized, but has also been unhesitatingly exercised when a proper state of facts required it. See *Combs* v. *Little*, (N. J.) 40 Am. Dec. 207; *Laing* v. *McKee*, 13 Mich. 124; *Wilson* v. *Eggleston*, 27 Mich. 257; *Adams* v. *Kable* (Ky.) 44 Am. Dec. 772; *Griffin* v. *Coffey*, 50 Am. Dec. 519; *Wingate* v. *Ferris*, 50 Cal. 105; *Beatty* v. *Brummett*, 94 Ind. 76; *Ryan* v. *Dox*, 34 N. Y. 307; *Schroeder* v. *Young*, 161 U. S. 334, 16 Sup. Ct. 512; *Tice* v. *Russell*, 43 Minn. 66, 44 N. W. Rep. 886. It may also be noted that the result of the establishment of the facts urged as the basis of plaintiff's action is to create a trust relation between him and the defendant. If the defendant secured the sheriff's deed by false promises, and under circumstances which in equity would entitle the plaintiff to relief against it, he would nevertheless hold the land, the title to which he had thus wrongfully acquired, as trustee for the benefit of the plaintiff. *Huxley* v. *Rice*, 40 Mich. 73; *Combs* v. *Little*, 40 Am. Dec. 207 (see note appended, with citations). This Court, in *Jasper* v. *Hazen*, 1 N. D. 75, 44 N. W. Rep. 1018, not only announces its adherence to the foregoing principle, but that case, which was somewhat similar to the one at bar, is strongly in point in upholding our view that plaintiff's remedy is, under the facts stated, exclusively in equity. The doctrine as announced by the Court and above referred to is also specifically embodied in section 4263, Rev. Codes: "One who gains a thing by fraud, accident, mistake, undue influence, the violation of a trust or other wrongful act, is, unless he has some other and better right thereto, an involuntary trustee of the thing gained for the benefit of the person who would otherwise have had it." Under the head of "Obligation of Trustees," section 4265, Id., provides

that "a trustee may not use or deal with the trust property for his own profit or for any purpose unconnected with the trust in any manner." Again, section 4273 fixes his liability in the following language: "A trustee who uses or disposes of trust property contrary to section 4265 may at the option of the beneficiary, be required to account for all profits so made or to pay the value of its use and if he has disposed thereof, to replace it with its fruits or to account for its proceeds with interest." Thus, not only does the statute declare that a trust relation results, but to some extent, at least, fixes the liability of the trustee; and should it appear that the plaintiff is entitled to relief, and the land in question and its fruits are not restored to him, if such is his election, he may recover its value, with interest, or the proceeds of the sale, with interest, as he may elect,—in either case deducting the amount due upon the sheriff's certificate. The facts which go to show the existence of the trust relation in this class of cases, as already stated, not only appeal directly to a court of equity, but the effect of successfully establishing them results in the finding of a trust, which is peculiarly of equitable cognizance.

No case has been found wherein an action at law has been maintained under the state of facts here existing. It is urged, however, that the fact that the remedy at law has not been resorted to by suitors is by no means conclusive on the question as to whether or not it should be accorded in this case. That is true. But we are clear that to hold that an action at law may be maintained upon the state of facts which here exists would be subversive of the fundamental principles which distinguish courts of law and courts of equity and their remedies. This court cannot lend its sanction to the recognition of a remedy at law where the remedy at equity is ample, long established, and by usage exclusive, particularly where the subject matter, as in this case, is so peculiarly the subject of equity jurisdiction. It may be urged that technically the objection made to the admission of evidence which the Court used as the basis of his order granting the new trial was not broad enough to raise the question as we have discussed it. We think that it was. Regardless of this, however, we are of the opinion that when the records of a case show that a case exclusively of equity jurisdiction has been tried as an action at law, and to a jury, and that a new trial had been granted by the trial court, this Court would sustain the order of the trial court setting aside the verdict and granting a new trail, regardless of the fact that neither party had made objections to such method of trial. Having reached the conclusion that the facts of this case make it one solely of equitable cognizance, the duty then fell upon the trial judge to find the facts himself. The verdict of a jury or findings of a referee would be simply advisory, and entirely subject to his control. See Rev. Codes, §§ 5420, 5460; also, Lawson, Rights, Rem. & Prac. § 3414. In *Milk* v. *Moore*, 30 Ill. 584, the Court said: "The chancellor is the sole judge of the evidence and its weight; and even when he directs

an issue of fact to be tried by a jury, to inform his conscience, he may adopt the verdict of the jury, or he may disregard it and render a decree against their finding, or he may grant a new trial, as he may believe justice demands." The action of the trial judge in setting aside the verdict and granting a new trial was therefore merely the exercise of an inherent authority of an equity court. This view is sustained by *Wingate* v. *Ferris*, 50 Cal. 105, which was a very similar case, with the exception that the property involved was personal. Wingate alleged that the steamer Express, owned by him, and of the value of $10,000, was about to be sold under legal process to satisfy a debt of $300; that the defendant, Ferris, agreed to attend the sale and bid the property in for him, and subsequently allow him to redeem by paying the amount of his bid and interest. Ferris did bid it in for $1,200, but, in violation of his promise, sold the property. Wingate asked for $9,027 damages. We quote from the statement: "The case was tried with a jury, the same as a case at law, and a general verdict returned in favor of the plaintiff for $4,939. Neither party objected to this form of trial, or asked for special findings. Judgment was rendered for the plaintiff for the sum named in the verdict." The defendant moved for a new trial, which the Court granted, stating the reasons therefor in this language: "The remedy of the plaintiff against the defendant is not in law (*Heylend* v. *Badger*, 35 Cal. 404), but in a court of equity (*Sanfoss* v. *Jones*, Id. 481); and the remedy is to redeem the property, if it is in the hands of the trustee, or to compel the trustee to account for it, if he has sold it to a bona fide subsequent purchaser without notice (*Sanfoss* v. *Jones*, supra). Defendant, it appears, sold the property. No action has been brought to set aside the sale. Plaintiff, therefore, does not complain of the sale as against the vendee of his trustee. He complains of the conduct of his trustee, but has not availed himself of his remedy to compel him to account to him concerning the trust. Defendant himself could have given this litigation that direction, by filing a cross complaint in equity, but neither has he chosen to do that. Both stand upon strict legal rights, and contest their claims by an action of trover in a court of law; and, as strict matter of law, I think defendant is entitled to a new trial." Plaintiff appealed from the order granting the new trial. In its opinion the Supreme Court said: "The complaint contains a statement of a cause of action such as would entitle the plaintiff to equitable relief. We entertain no doubt that the District Court had power to set aside the general verdict and the judgment entered thereon. As the cause was one or equity cognizance, the facts should have been found by the Court, or specially by a jury under an order of the Court. The order vacating the verdict was proper." The Court, however, did not affirm that portion of the order granting a new trial, stating that no reason appeared why the testimony need be retaken, but directed the District Court to proceed to determine the issues of fact "upon the testimony already taken, and upon such further testimony, if

any, as may be taken, in case the said District Court shall, in its discretion, open the case for further testimony." We do not deem it advisable in this case to require the trial court to use the testimony already taken, or to restrict the steps which counsel may see fit to take to properly prepare the issues and submit the case to the Court in accordance with the views we have expressed. The order granting the new trial and vacating the verdict is affirmed. The costs of this appeal to abide the final decision of the case. All concur.
(77 N. W. Rep. 1012.)

A. F. KUHNERT *vs.* ERASMUS D. ANGELL.

Opinion filed December 7, 1898.

Negligent Obstruction of Trail—Evidence.

To support a verdict for damages for injuries done to a team of horses and other property, caused by colliding with an unlawful obstruction upon a well-defined trail, traveled for more than one year, under section 7550, Rev. Codes, there must be some evidence connecting the defendant with the doing of the unlawful act causing the injury.

Tort of Sub-Agent—Done in Violation of Instructions.

Where it appears that defendant, for his principal, and pursuant to his request, employed a third person to build a fence around certain unoccupied land for which defendant was agent, and had such fence built by a third person, and the latter, in violation of defendant's instructions, and without his knowledge, erects an unlawful fence across such trail, and injury results therefrom, defendant is not liable, under the section above referred to.

Appeal from District Court, Cass County; *Pollock*, J.

Action by A. F. Kuhnert against Erasmus D. Angell, for recovery of damages because of injuries to a team sustained by running into a barbed wire fence. Plaintiff obtained a verdict, a new trial was ordered and plaintiff appeals from the order granting new trial.

Affirmed.

John E. Greene, for appellant.

A. B. Lee and *Benton & Bradley*, for respondent.

YOUNG, J. The plaintiff, who is the proprietor of a livery stable in the city of Fargo, obtained a verdict in this case in the District Court for injuries done to one of his teams, and other attendant and consequent injury, resulting from its being driven into a barbed-wire fence, placed across what he designated as a "trail," the fence not having the protective guard rails which the law requires at such places. Defendant was the agent for the owner of the land where the accident occurred. The defendant made a motion for a new trial, which was granted. Plaintiff appeals. We think the motion for a new trial was properly granted, and find it necessary

to refer to only two of the several grounds upon which the motion was based. At the close of the case, the defendant asked for a directed verdict, stating among other grounds, this: That the evidence failed to show that the defendant had any direct connection with the work himself (that is, the building of the fence causing the injury). Insufficiency of the evidence to justify the verdict was also urged in the motion, one of the particulars specified being in the following language: That "there is no evidence in this case which shows or tends to show that the defendant, as agent for the owner of the land, on the line of which the accident occurred, was guilty of any act of nonfeasance, either towards his principal or the public." It appears that, early in 1896, George B. Hunt, who was the owner of the land where the accident occurred (which we may add was an unoccupied tract, having no buildings upon it, and mostly in timothy meadow), requested defendant, who for several years had managed it, attended to leasing it, and otherwise looked after the owner's interest, to build a fence around it. Pursuant to the directions received from Mr. Hunt the defendant employed a Mr. Stenso to erect the fence. The latter did so, and was paid for it upon its completion, by the defendant, on July 1, 1896. This fence consisted of three strands of barbed wire, attached to cedar posts. It crossed what, for the purpose of this decision, we will treat as a well-beaten trail, traveled for the length of time necessary to bring it within the meaning of the statute. No board, pole, or other suitable protection was placed on the fence where it crossed the trail, as required by statute. On the night of July 13, 1896, at about 11 o'clock p. m., plaintiff's team, driven by a person to whom he had hired it, in following this trail ran into the fence, resulting in the injury complained of. Plaintiff brings this action under section 7550 of the Revised Codes, which is as follows: Every person who shall knowingly and willfully obstruct or plow up or cause to be obstructed or plowed up, any public highway or public street of any town, except by order of the road supervisors for the purpose of working the same, or injure any bridge on the public highway, or shall build or place a barbed wire fence across any well traveled trial, which has been the usual and common route of travel for not less than one year prior to the commission of the offense; without placing on the outside of the top tier of barbed wire on said fence, a board, pole or other suitable protection, to be at least sixteen feet in length, shall be deemed guilty of a misdeamor, and upon conviction shall be punished by fine not exceeding one hundred dollars, and shall be liable for all damages to person or property by reason of the same." The plaintiff does not seek to recover from the defendant on the ground that the latter was negligent in not properly protecting the public against injuries which might result from the unsafe condition of the property intrusted to his care by Mr. Hunt, and that this was the cause of the injury. He sues under the statute above quoted, and to entitle him to recover the facts must be suffi-

cient to sustain a verdict under that statute. The section referred to is found in the Penal Code. It makes one who knowingly and willfully places or builds a barbed-wire fence, without the protection features, across a well-traveled trail, which has been in common use for at least one year prior to the act of building, guilty of a misdemeanor, and punishable by a fine. In addition, such person is made liable for damages. To recover under this statute, the plaintiff must show that the defendant built or placed an unlawful obstruction across the trail, in the form of a fence, without the necessary protection which the law requires, and this knowingly and willfully. We do not mean to say that the defendant must have actually done the work himself, but he must have been associated or connected with it in some manner, other than by inference, so as to make him an actor in willfully and knowingly doing the unlawful act. Not only is there no evidence in the case tending to show that the defendant assisted in building or placing the unlawful fence across the trail, actually, by direction or otherwise, but it does appear affirmatively, and is not disputed, that the defendant directed the party who actually built the fence to place guard rails upon it at the crossing of this trail; further, that, at a later time, when the fence needed repairing at this point, he reiterated the same directions. It also appears that the defendant was not aware that these directions had not been complied with, until after the accident. The defendant, therefore, having directed the building of a lawful fence, cannot be held liable, under the statute, upon inferences drawn from the fact that he was the agent of the owner of the land. Upon the two grounds before indicated, the District Court properly granted a new trial. That order is affirmed. All concur.

(77 N. W. Rep. 1015.)

EMMA G. TOWNE *vs.* ST. ANTHONY AND DAKOTA ELEVATOR COMPANY.

Opinion filed November 11, 1898.

Elevators—Conversion of Stored Wheat—Demand.

Plaintiff and one M. entered into a contract whereby plaintiff sold and agreed to convey a tract of land to M., to be paid for in crops to be raised on the land by M. It was stipulated that one-half of such crops each year should be delivered by M. at some elevator at Erie, Cass county, in this state, and that elevator tickets should be taken for such moiety in the plaintiff's name. M. delivered all the grain raised on said land in the year 1895 to the defendant's elevator, situated at said Erie; but tickets for the whole of said grain were delivered to M., and in his name, and the plaintiff has never received any of said tickets or the proceeds of any part of said crop. Said contract of sale was never filed for record, and the defendant had no notice or knowledge of the terms of such contract at the time the

wheat was received and tickets delivered to M. therefor. Storage tickets were given for the wheat to M., as aforesaid, and the wheat, as soon as received, was mingled with other wheat of like kind; and subsequently, and before suit, the wheat was, in due course of the defendant's business, shipped out of the state by the defendant. Plaintiff sues for the conversion of the wheat, and introduced testimoney as to its value at the date it was received in the elevator, but not at any later date. *Held*, first, that the defendant was an innocent bailee of the wheat, without notice; and that the acts of receiving the same and giving storage tickets to M. therefor, followed by mingling the grain with other grain, were all and singular lawful acts of the defendant, done in the usual course of its business; and that no action for conversion would lie for the same, in the absence of a demand for the grain brought before suit.

Refusal to Surrender on Demand—Conversion.

Some two weeks after the delivery of the grain to defendant, and prior to bringing suit, plaintiff caused a proper demand for the wheat to be made of the defendant, and defendant refused to surrender the wheat. *Held*, that such demand and refusal operated as a conversion of the wheat, for which the action will lie.

Proof of Value at Time of Demand.

Held, further, that, inasmuch as no evidence was offered of the value of the wheat at the time of the demand, the plaintiff cannot recover in this action.

Judicial Notice—Presumption of Continuance.

Held, further, that this Court cannot judicially notice the value of grain at a given date, even where the evidence shows its value at a date two weeks prior to the date in question.

Shipment of Wheat—When Evidence of Conversion.

Query, whether the mere shipment out of the state by the defendant of such wheat in due course of business was in itself an act of conversion.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Emma G. Towne against the St. Anthony & Dakota Elevator Company. From a judgment for plaintiff, defendant appeals.

Reversed.

Cochrane & Corliss, for appellant.

Defendant did not convert the wheat by receiving and storing it with other grain of like kind and grade. By her contract with Murray plaintiff required him to deliver one half of the wheat in the elevator at Erie in her name. She must be regarded as having directed this to be done in the light of the known usages of warehousemen to mingle in a common bin wheat deposited with them for storage. *National Exc. Bank* v. *Wilder*, 34 Minn. 149-156. The failure of defendant to issue tickets in the name of plaintiff would not be the assertion of such dominion or control over the wheat as would constitute conversion. *Spooner* v. *Manchester*, 133 Mass. 270; *Laverthy* v. *Snethen*, 68 N. Y. 522; *Metcalf* v. *McLaughlin*, 122 Mass. 84; *Strickland* v. *Barrett*,

20 Pick. 415; *Sanford* v. *Elevator Co.*, 2 N. D. 6. The receipt of property by a bailee from a thief does not of itself constitute a conversion thereof. A demand by the real owner is necessary to put the bailee in default. *Brenshouse* v. *Abbott*, 45 N. J. Law 531; *Burditt* v. *Hunt*, 25 Me. 419; *Gurley* v. *Armstead*, 148 Mass. 267; *Valentine* v. *Duff*, 33 N. E. Rep. 529; *Bates* v. *Stanton*, 1 Duer, 79; *Rembaugh* v. *Phipps*, 75 Mo. 422; *Loring* v. *Mulcahey*, 3 Allen 575; *Nanson* v. *Jacob*, 6 S. W. Rep. 246, 249 and cases cited; *Smith* v. *Colby*, 67 Me. 169; *Waring* v. *R. R.*, 76 Pa. St. 491; *Leonard* v. *Tidd*, 3 Metc. 6. The bailee may safely return the goods to the thief after notice that a third party claims them, if this is done before a demand by such third person is made. *Rembaugh* v. *Phipps*, 75 Mo. 422; *Loring* v. *Mulcahey*, 3 Allen 575; *Gurley* v. *Armstead*, 148 Mass. 267; *Nanson* v. *Jacob*, 6 S. W. Rep. 246. The defendant having innocently dealt with one in the actual possession of the property cannot be held as for conversion without proof of a demand for the property and a refusal to deliver. *Plano Mfg. Co.* v. *N. P. Elev. Co.*, 53 N. W. Rep. 302; *Gillett* v. *Roberts*, 57 N. Y. 28; *Ely* v. *Ehle*, 3 N. Y. 506; *Barrett* v. *Warren*, 3 Hill 348; *Abernathy* v. *Wheeler*, 92 Ky. 320; *Parker* v. *Middleton*, 24 Conn. 207; *Hovey* v. *Bromley*, 33 N. Y. Supp. 400; *Valentine* v. *Duff*, 34 N. E. Rep. 453; *Salt Springs Nat. Bank* v. *Wheeler*, 48 N. Y. 492; *Sanford* v. *Duluth & Dakota Elev. Co.*, 2 N. D. 6-13; Biglow Lead. Cas. Torts, 446. There being no conversion at the time of the delivery of the grain, any conversion which took place must have taken place later. As a foundation for judgment for damages, therefore, plaintiff should have proved value at the time of the conversion. Sec. 5000, Rev. Codes. There is no evidence in the case on which the Court can base a finding as to the value of the property at the time of conversion, hence no foundation for judgment for damages. *Fargusson* v. *Talcott*, 7 N. D. 183, 73 N. W. Rep. 207. Under the statute which plaintiff had in view when ordering Murray to store her grain in an elevator and under the tickets actually issued, the transaction was a bailment and not a deposit for exchange. Plaintiff continued the owner of her proportionate part of the mass of grain of the same kind and grade, no matter how much grain, owned by the elevator company, was taken and shipped out of the state from that mass. § 1792 Rev. Codes; 28 Am. & Eng. Enc. L. 669. A bailee, when property is demanded by a third person, has a right to take reasonable time to investigate the title of such claimant. Note to 24 Am. St. Repts. 806. He may demand some evidence of title of the third person, or may require an agent to show his authority. *Taylor* v. *Spears*, 6 Ark. 381, 44 Am. Dec. 519; Note to *Bolling* v. *Kirby*, 24 Am. St.Repts. 807. Attaching an instrument to a pleading does not make it a part thereof unless it is an instrument for the payment of money only. § 5268 Rev. Codes; *Mayor* v. *Signoret*, 50 Cal. 298; *Buck* v. *Fisher*, 2 Colo. 185; *Brooks* v. *Paddock*, 6 Colo. 36; *Baker* v. *Berry*, 37 Mo. 307; *Kern* v. *Ins. Co.*, 40 Mo. 25; *Peake* v. *Bell*, 65 Mo. 224; *Pomeroy* v.

Fullerton, 133 Mo. 440; *Hartford Ins. Co.* v. *Kahn,* 34 Pac Rep. 895; *Jackson* v. *Ins. Co.,* 6 Pac. Rep. 731; *Watkins* v. *Brunt,* 53 Ind. 208; *Burkett* v. *Griffith,* 27 Pac. Rep. 527; *Aultman* v. *Seglenger,* 2 S. D. 446; *Rust Owen Co.* v. *Fitch,* 3 S. D. 217; *Wright* v. *Sherman,* 3 S. D. 290; *Excelsior D. Co.* v. *Brown,* 38 Ind. 384; *Lytle* v. *Lytle,* 37 Ind. 281; *Wyant* v. *Wyant,* 38 Ind. 48; *Campbell* v. *Cross,* 39 Ind. 155; *Hazzard* v. *Heacock,* 39 Ind. 172; *Trueblood* v. *Hallingsworth,* 48 Ind. 537; *Cario & Fulton R. Co.* v. *Parks,* 32 Ark. 131; *Gebhart* v. *Garnier,* 23 Am. Rep. 722; *Harlowe* v. *Boswell,* 15 Ill. 57; *State* v. *Helms,* 35 N. E. Rep. 894; *Larimore* v. *Wells,* 29 Ohio St. 13; *Taylor* v. *Blake,* 11 Minn. 255.

Morrill & Engerud, for respondent.

No question can be reviewed on appeal unless it is properly specified as an error. *Nichols & Shepard Co.* v. *Stangler,* 7 N. D. 102, 72 N. W. Rep. 1089; *Globe Inv. Co.* v. *Boyum,* 3 N. D. 538, 58 N. W. Rep. 339; *O'Brien* v. *Miller,* 4 N. D. 308; *Hostetter* v. *Brooks Elev. Co.,* 4 N. D. 161; *Schmitz* v. *Heger,* 5 N. D. 165. The trial court found as a fact that defendant took the grain and converted it. This finding is not excepted to nor attacked in the specifications of error, hence its correctness is deemed admitted. Ch. 5 Laws 1897, § 5467 Rev. Codes. The question of conversion is specified in the statement of the case as a question to be retried, but this is not a specification of error. Haynes New Trials & Appeals, § § 149, 150. The issuance of storage tickets to Murray, the disposition of part of the grain, and subsequently honoring the tickets issued therefore was a conversion. 26 A. & E. Enc. L. 733; 5 A. E. Enc. L. 528, § 2. Under such circumstances while a demand and refusal would be good evidence of conversion it is not necessary. *Myrick* v. *Bill,* 3 Dak. 284, 17 N. W. Rep 268; *Nichols* v. *Barnes,* 3 Dak. 148, 14 N. W. Rep. 110; *Rosum* v. *Hodges,* 1 S. D. 308, 47 N. W. Rep. 140; *Consolidated Land Co.* v. *Hawley,* 7 S. D. 229, 63 N. W. Rep. 904. Defendant is not an innocent bailee. *Best Brewing Co.* v. *Pillsbury,* 5 Dak. 62, 37 N. W. Rep. 763; 3 Am. & Eng. Enc. L. (2nd Ed.), 762 n. 3. Appellant cannot cannot secure a reversal for an error so trifling as the failure to prove value on the day of conversion, when a proper objection upon this ground at the trial would have enabled plaintiff to make good the proof. *Loverin-Browne Co. v. Bank,* 7 N. D. 569, 75 N. W. Rep. 923. Attaching the contract to the complaint as an exhibit, with proper allegations identifying and referring to it, is a proper method of pleading its contents. *Ward* v. *Clay,* 82 Cal. 502; *Lambert* v. *Haskell,* 80 Cal. 611; *San Diego Co. Bank* v. *Burns,* 104 Cal. 477. In Arkansas where the opposite rule prevails the appellate court will look to exhibits as a part of the pleading to sustain the lower court's rulings. *Buckner* v. *Davis,* 29 Ark. 444; *Holman* v. *Patterson,* 29 Ark. 357.

WALLIN, J. This is an action brought to recover damages for the alleged conversion of plaintiff's wheat, and was tried to the Court, under the provisions of chapter 5 of the Session Laws of 1897. The trial court filed its findings of fact and conclusions of law, and a statement of the case was settled, in which are embodied specifications of alleged errors of law, and likewise of particulars wherein appellant claims that the findings of fact are not supported by the evidence. Such specifications are, however, not required, under the act of 1897. *Farmers' & M. Nat. Bank* v. *Davis*, 8 N. D. 83, 76 N. W. Rep. 998. The rule of this Court requiring specifications was framed at a time when this Court sat only for the correction of errors, and prior to the statute of 1893, which so completely revolutionized the practice in cases tried below without a jury. This rule, it is true, was perpetuated in the amended rules of this Court, but the same is now in force and governs in jury cases only. Id. In this case, as will appear later, appellant has conformed to the requirements of the act of 1897, and specified in the statement certain questions of fact which it desires this Court to reinvestigate or retry.

Almost every fact which enters into the case is controverted but for the purposes of the decision we shall accept the respondent's version of the facts, except upon the decisive question of whether the defendant, when it received the wheat, had notice of the plaintiff's rights in the wheat, or sufficient notice thereof to put it upon its inquiry with respect thereto. For the purpose of the decision, the material facts will be epitomized as follows: In 1892 the plaintiff was the owner of a tract of land situated in Cass county, and at that date entered into a written contract with one Adam Murry to sell him the land on what is known as the "crop payment plan." By the terms of the contract, Murry was to have possession of the land, and was required to put it in crop each year until the land was paid for. The contract further stipulated as follows: "One-half of the grain to be sown and grown on said premises in each and every year hereafter, and during the continuance of this contract, beginning with the crop of the year 1893; said one-half of grain to be delivered in the elevator or on the cars at Erie, Cass county, North Dakota, or at some other convenient point not more remote, as said first party shall direct, within a reasonable time after threshing the same, and free of all expense or charge to the first party; said grain to be delivered in the name of the first party (the plaintiff), and to be by the first party promptly sold, and the proceeds thereof applied, first, in payment of interest on said sum at eight per cent. per annum, and, second, in reduction of said principal sum." Under this contract, Murry went into possession, and farmed the land until and including the year 1895. In that year Murry raised a crop of 1,048 bushels of No. 1 Northern wheat, and on the 16th and 17th days of September, 1895, delivered all of said wheat to the defendant's elevator at Erie, Cass county; and the defendant issued storage tickets in the usual form therefor, but

such tickets were issued to Murry in Murry's name, and the proceeds thereof were subsequently appropriated by Murry, and the plaintiff has never received any part of said wheat or its proceeds. On receiving the grain, the defendant mingled the same with other grain in its elevator of like kind and grade. Subsequently, but at what date does not clearly appear, defendant, in the usual course of its business, shipped the grain out of the state.

It is not claimed by the respondent that the act of receiving the wheat into its elevator or mingling the same with other grain in a general mass, constitutes a conversion of the grain by the defendant. No such claim would be tenable if made, because the contract provides in terms that Murry shall deliver one-half of the grain in the elevator at Erie, where the same was delivered. But respondent contends that the act of issuing storage tickets for the grain in the name of Murry, being in violation of the explicit terms of the contract, was an act inimical or adverse to the rights of the plaintiff, who owned the grain, and especially so as the contract provided that the title of all such grain should remain in the plaintiff until after the delivery of one-half thereof was made by Murry. The plaintiff must be regarded as having directed, or at least assented to, the mixing of her grain with other grain of like kind in the elevator, in view of the known usages of the warehousemen in this state who receive grain for storage. See *Bank* v. *Wilder,* 34 Minn. 149-156, 24 N. W. Rep. 699. We are disposed to accept the view of the respondent's counsel, and sustain their contention, as to the abstract legal proposition that the act of delivering the storage tickets and the whole thereof, to Murry and in his name, if done after notice of plaintiff's rights, was an act adverse to the rights of the plaintiff, and of such a prejudicial nature as would constitute a conversion of the property, for which an action would lie. The proposition is elementary. 26 Am. & Eng. Enc. Law, 714, and notes. But in the case at bar the contention of the appellant is that the defendant was without notice of plaintiff's rights in the wheat under the contract; and this contention is, in our judgment, the pivot upon which the decision of this case must turn.

It is conceded that the written contract was never filed in the office of the register of deeds, and hence that defendant did not have at any time constructive notice of the existence or terms of the contract. But plaintiff's contention is that the defendant had actual notice of the contract, or at least notice of facts sufficient to put defendant upon inquiry to ascertain the particular terms of the instrument. The testimony upon this question is within a limited compass. The defendant's agent, who received the wheat into the elevator, testified positively that, when he received the grain, he had no knowledge or notice whatever of plaintiff's rights or claims to the wheat; nor is there any evidence in the case that such agent had ever had any notice or knowledge of plaintiff's claims at any time until a date subsequent to the delivery of the wheat tickets, pursuant to the order of Adam Murry. One William H. Best

gave his deposition, and in plaintiff's behalf, and testified that he was the agent of the plaintiff, and represented her, in negotiating the sale of the land, and also acted for the plaintiff with respect to the crop of 1894, raised by Murry on the land, and during all the time in question was the sole agent of plaintiff with respect to her rights under the contract. This witness was asked: "You may state, if you know, what knowledge the defendant or its agent at Erie, at the elevator or warehouse at Erie, where Adam Murry delivered the wheat in question in 1895, had of the contract (Exhibit A), and of the rights of the plaintiff in question to the grain grown upon the premises in 1895, on or before the delivery of the grain so grown in 1895 to that elevator. A. I had had the same trouble with the same people over seed liens on this crop in 1894. Payment of the wheat was held by the company. I notified them of this contract, and of the claim, and also the agents at Erie. I had to put up a bond before they would pay me for the wheat tickets of the crop of 1894." It will be observed that the question of plaintiff's counsel is somewhat involved, and was framed ingeniously so, as to call for an answer as to the witness' knowledge of any notice brought home to the defendant or its agent at Erie of plaintiff's rights under the contract to the crop grown on the land in 1895. The answer of the witness, however, refers only to a transaction occurring the year previous, and one relating wholly to the crop of 1894. This answer embraces all the evidence in the record touching the subject of defendant's notice of plaintiff's rights in the crop of 1895, had or received by the defendant, until a date subsequent to issuing the storage tickets in question. The answer therefore is decisive upon the point of notice or want of notice. In the light of this testimony, it is proper to note that the controversy of 1894 did not arise between the plaintiff, on the one side, and Adam Murry, on the other. The plaintiff and the defendant were then at loggerheads, and the point of the dispute was the refusal of the defendant to cash plaintiff's wheat tickets, which tickets must then have been in the witness' possession, until a seed-lien claim was taken care of, nor were the tickets cashed until plaintiff "put up a bond." This bond, it seems, was required as indemnity to defendant against any loss on account of the seed lien. The matter of the seed lien being adjusted, the plaintiff's tickets were cashed, and the trouble over the 1894 crop was at an end. Such a controversy, from its nature, did not, in our opinion, call for any examination of the land contract for the purpose of considering the respective rights of the parties thereto, and especially so as to their rights in crops to be grown on the land in future years. So far as appears, the crops of future years were not mentioned in the controversy over the crop of 1894. The fair inference from the testimony is that defendant had received the crop of 1894 from Murry, and that neither Murry nor any one else then claimed any adverse interest in the crop represented by plaintiff's storage tickets, except the holder of the seed lien. Under these circum-

stances it is unreasonable to suppose that the defendant would enter into the matter of the respective rights of Adam Murry and the plaintiff to future crops grown on this land, as such rights are affected by the lengthy written contract defining such rights. The evidence lends no warrant for the inference that the contract itself, or a copy thereof, was ever delivered to the defendant's agents or officers, or read to any of them at any time. The witness says: "I notified them of this contract, and of this claim." The phrase "this claim" could refer only to the claim the witness was then pressing upon defendant's attention, viz: a claim to have the tickets for the 1894 crop cashed. That was the only claim the witness then had. The statement that he "notified them" in its very form excludes the idea that he showed the contract to the defendant's representatives, or read it to them. If the witness had done so, it is reasonable to infer that he would have so testified. His silence here, when it was to his interest to speak, is important, and to our mind significant. As we have seen, the occasion did not call for an examination of the contract itself, or of any scrutiny of its terms with reference to the respective rights of the parties thereto. Under such circumstances, it would suffice to satisfy the defendant's agents, as prudent business men, to be notified by the witness in a general way that plaintiff had a contract under which the particular tickets then involved—*i. e.* tickets for the crop of 1894—belonged to the plaintiff, whose agent then had the same in hand. To our mind it would be wholly unwarranted to hold that the defendant is chargeable with notice (arising from the transaction occurring in 1894) that the plaintiff would be the owner of one-half of any crop raised on the land by Adam Murry for an indefinite number of years in the then future. We see in the transaction of 1894 no fact reasonably calculated to awaken inquiry as to the disposition of any future crop to be raised by Murry upon the land. To our mind it is clear that no reference need have been made by the witness to the terms of the contract in question in order to meet the exigency of the transaction then being had between him and the defendant. At that time no one claimed the proceeds of the plaintiff's tickets, save only to satisfy a seed lien held by a stranger. Under such circumstances it seems but natural to suppose that only a general reference was made to the contract; and that, only, to explain the patent and undisputed fact that the plaintiff owned the tickets for the crop of 1894, and had a right, as such owner, to receive the proceeds thereof. We therefore hold that the defendant received the crop of 1895 lawfully, and without any notice or knowledge of the rights of this plaintiff thereto.

It is conceded that, as an innocent bailee receiving the wheat for storage, the defendant did not convert the wheat to its own use, nor in mingling the wheat with other grain, as it is usual to do in the course of its business, did the defendant do an unlawful act, for which an action in the nature of trover will lie. These acts, having been done in good faith, and with no notice of the plaintiff's

rights, do not in themselves constitute a conversion, or give rise to a cause of action in favor of the plaintiff. It is true that the wheat at all times was the property of plaintiff, and, being so, the wrongful act of her agent in taking storage tickets in his own name could not devest the plaintiff of her title to the wheat. But it is elementary, in a case where a bailee takes possession innocently, and without notice of the plaintiff's rights, that a demand is an essential prerequisite to an action either for the property in specie or its value. See *Sanford* v. *Elevator Co.*, 2 N. D. 6, 48 N. W. Rep. 434; *Plano Mfg. Co.* v. *Northern Pac. Elevator Co.* (Minn.) 53 N. W. Rep. 202; *Gillett* v. *Roberts*, 57 N. Y. 28; *Ely* v. *Ehle*, 3 N. Y. 506; *Abernathy* v. *Wheeler*, 92 Ky. 302, 17 S. W. Rep. 858; *Parker* v. *Middlebrook*, 24 Conn. 207. Under the rule laid down in these cases, a demand before suit was indispensable; but plaintiff's counsel contends that the record shows that two separate demands of defendant for the wheat were made in plaintiff's behalf before the action was instituted. Appellant's counsel claim that the evidence fails to show a proper demand; but, for the purposes of the decision, we will assume that the demands were made and that they were properly made. The first of these demands was made about the last day of September, 1895, and the last at some date not definitely shown, but which was subsequent to the first demand. Under the facts of this case, the refusal to deliver the wheat to the plaintiff upon her proper demand therefor was prejudicial and wrongful, and operated as a conversion of the wheat, and would therefore entitle the plaintiff to recover the value of the grain on the date of such demand and refusal, with interest. Rev. Codes, § 5000. But this record is devoid of evidence of the value of the wheat in controversy at any time other than on the 16th and 17th days of September, 1895, at which time the price of the wheat was 41 cents per bushel, as shown by the testimony. There being no evidence in the case as to the price of the wheat at the date of the demands, or either of them, the Court is not in a position to direct the entry of judgment for the value of the wheat when the same was converted to the use of the defendant. It is obvious that this Court cannot take judicial notice of the market price of wheat at any particular date, and especially so at a date more than three years prior to the retrial of the case in this Court. Nor does evidence of the price in the middle of September, 1895, suffice to inform this Court of the price at the end of said month of September.

Respondent contends, further, that the evidence discloses that the defendant shipped the wheat out of the state at a date prior to the institution of this action, and that this was done in hostility to the plaintiff's rights, and hence will operate as a conversion without demand. Whether, under the facts of this case, the shipment of the wheat out of the state, in ignorance of the plaintiff's rights, would operate as a conversion, is a point of some difficulty perhaps;

but the question need not be disposed of now, because the date of the shipment cannot be definitely ascertained from the evidence, and, if it could be, there would be a total absence of testimony showing the value of the wheat at the date of such shipment, or at any date subsequent to the shipment. There being no evidence of the value of the wheat at the time of the demand therefor, or when it was shipped out of the state, the plaintiff cannot recover. The apparent hardship of depriving the plaintiff of the value of her wheat is somewhat mitigated by the fact that it was largely by reason of her own fault that the defendant innocently received the wheat from another party, and paid for the same. The District Court is directed to reverse its judgment, and enter a judgment dismissing the action. All the judges concurring.

ON APPLICATION FOR REHEARING.

The petition for a rehearing in this case will be denied. We think a new trial would not be in furtherance of justice. The ground upon which a new trial is asked would be wholly insufficient if the action had been tried to a jury, and a motion for a new trial had been addressed to the District Court. The only ground for a new trial urged is that at the trial before the District Court the defendant omitted to offer evidence of the value of the grain at the time of its conversion by the defendant. But a mere failure to put in evidence furnishes no ground for a new trial. This is elementary. It is true that chapter 5 of the Laws of 1897 permits this Court, in cases tried here anew, to grant a new trial in exceptional cases, and where a new trial is absolutely necessary to the accomplishment of justice. This feature of the statute is novel, and precedents are therefore not available to enlighten this Court as to a proper exercise of the discretion conferred by the statute. But, in actions at law coming here to be tried anew, it will, in our opinion, be a safe general rule—subject to possible exceptions—to be controlled by the authorities and well-established principles of law which govern the granting of new trials in actions tried to a jury. Guided by such authorities and principles of law, the plaintiff is not entitled to a new trial of this action, for the reason already given.

But, in our opinion, a new trial should be denied for reasons other than technical. It appears that the defendant, in receiving the wheat into its warehouse and issuing storage tickets therefor, acted innocently, and with no notice, actual or constructive, of plaintiff's ownership of the grain. In fact, the plaintiff in effect directed Adam Murry to store the wheat in defendant's warehouse. In due course of business, the defendant, after becoming responsible for the wheat to the holders of the storage tickets, shipped the same out of the state. The defendant, under these circumstances, became responsible for the wheat, and could be compelled to deliver the same to the holders of the storage tickets therefor. Doubtless such wheat had been delivered at a date long prior to the commencement of this

action. If, after such delivery of the wheat, the plaintiff should recover for its value, the obvious practical result will be to impose upon the defendant a double liability. This, certainly, would work a hardship, which should be avoided, if possible without a violation of settled principles of law. As we have already shown, the plaintiff has had her day in court, and an opportunity to recover at law, and has failed, and that she is now unable to advance any legal reason for a new trial.

Finally, a denial of a new trial does not leave the plaintiff remediless. She has in reserve her original right of action against Adam Murry, by whose wrongful act the plaintiff was deprived of the storage tickets for her share of the grain. Murry converted the storage tickets, and thereby incurred a legal liability to plaintiff for their value. Under these circumstances, we are clear that a new trial would not aid in the accomplishment of justice.

(77 N. W. Rep. 608.)

DAVID LANE *vs.* THOMAS O'TOOLE.

Opinion filed December 12, 1898.

Claim and Delivery—Evidence of Ownership.

In a claim and delivery action, the plaintiff sought to recover certain grain grown by defendant upon land upon which defendant had long resided. Plaintiff based his right to recover solely upon a certain written contract, which he put in evidence. At the trial defendant offered testimony to show that the contract under which the plaintiff claimed had, by a mutual understanding of the parties thereto, never gone into effect, and that the grain in question was not raised pursuant to the terms of such contract. This evidence was excluded. *Held,* that such ruling is prejudicial error.

Appeal from District Court, Pembina Count; *Sauter,* J.

Action by David Lane against Thomas O'Toole. Verdict for plaintiff. From an order denying a new trial, defendant appeals.

Reversed.

Bangs & Guthrie, for appellant.

Bosard & Bosard, for respondent.

WALLIN, J. This action was tried to a jury, and a verdict was directed in favor of the plaintiff. A motion for a new trial, based upon a statement of the case, was denied, and from the order denying the motion defendant appealed to this Court. No exception was taken to the instructions of the Court to the jury, nor did defendant except to the refusal of the Court to direct a verdict in defendant's favor, as the Court was requested to do at the close of the case. Nor can there be any review of the evidence in this case to determine whether the verdict is sustained by the evidence. After a careful consideration of the record, we confess our inability to

understand upon what theory of the evidence a verdict was directed in plaintiff's favor, but as the instruction to do so was not challenged by an exception, we are bound to assume, in support of the order denying a new trial, that the evidence warranted such instruction. The action is brought to recover the possession of a quantity of grain raised by the defendant in the year 1896 upon certain real estate described in the complaint, upon which defendant had continuously resided for many years, and upon which he resided at the time of the trial. The complaint alleges a general ownership of the grain; also a demand therefor. The answer denied these averments, and demanded judgment for a return of the property. The grain was taken by claim and delivery proceedings, and turned over to the plaintiff, and was not rebonded by the defendant. The plaintiff put in evidence a deed of conveyance of said land from one O. M. Omlie to plaintiff, which was executed December 4, 1895, and recorded on the 14th of the same month; also a certain written instrument, purporting to be a contract of purchase and sale, made November 20, 1894, between defendant and said O. M. Omlie for the land in question. As this contract furnishes the only ground upon which plaintiff claimed a right to the possession of the grain in question, we will here set out its terms: "This agreement, made and entered into this 20th day of November, 1894, by and between O. M. Omlie, party of the first part, and Thomas O'Toole, party of the second part, witnesseth: That the party of the first part, for and in consideration of the covenants and agreements of the second party hereinafter set out, all of which said covenants and agreements are to be strictly kept and fulfilled by the party of the second part, time being of the essence of this contract, the said party of the second part agrees that, upon the full and entire completion of all said covenants and agreements of said second party, in the time and in the manner as hereinafter set forth, to sell, transfer, and set over to the said party of the second part, by a good and sufficient deed, with the usual covenants of warranty, the following described real estate, lying and being in the County of Pembina and State of North Dakota, to-wit, the north half of the northeast quarter of section 21, and the west half of the northwest quarter of section 22, all in township one hundred and fifty-nine north, of range fifty-five west (N. ½ N. E. ¼ Sec. 21, and W. ½ N. W. ¼ Sec. 22, Twp. 159 N., R. 55 W.), and containing one hundred and sixty acres, more or less, according to the United States survey thereof. And the said party of the second part, for and in consideration of the covenants and agreements of the party of the first part above set out, agrees to take and hold the said real estate, and to purchase the same hereafter, in accordance with the conditions of this contract, of the said first party, and to pay therefor the sum of twenty-eight hundred dollars, to-wit: The sum of five hundred dollars, and interest on the whole sum of the purchase price, on or before November 1st, 1895; the sum of six hundred dollars, and interest on the unpaid portion of the purchase price, on or

before November 1st, 1896; the sum of seven hundred dollars, and interest on the unpaid portion of the purchase price, on or before November 1st, 1897; the sum of one thousand dollars, and interest, on the first day of November, 1898,—all of said sums bearing interest at the rate of twelve per cent. per annum, according to the conditions of four promissory notes, bearing even date herewith, for the amounts and due at the respective dates above set forth. And the party of the second part agrees to pay all taxes and assessments of every name, nature, and description that may be levied upon the said premises during each and every year subsequent to the year 1894. And it is further expressly stipulated and agreed, by and between the parties hereto, that no title or right to possession of the premises herein described passes to the party of the second part until after the full and entire completion of all the conditions and covenants and agreements, at the time and in the manner as herein set out, of this contract, by the party of the second part. And it is further stipulated and agreed that the title, right of possession, and ownership to the said premises are and shall remain in the party of the first part until the entire completion of the terms and conditions of this contract by the party of the second part, except that the party of the second part shall have the right to enter upon the said premises in the spring of 1895, and each succeeding spring, during the continuance of this contract, for the purpose of seeding the said premises to such crops as shall be mutually agreed upon by the parties hereto; and that, until the completion of the terms of this contract, this contract shall be construed to be a contract of rental of the said premises; and, upon the refusal or failure of the party of the second part to do and perform all the conditions of this contract at any time, the party of the first part shall have the right to declare this contract null and void, and no longer of any binding force and effect on the said party of the first part; and the party of the first part shall have the right to enter upon said premises at any time after declaring the contract forfeited, and to eject the party of the second part, and to take possession of all grain of any kind grown on such place during said year as such contract shall be declared forfeited, and out of the proceeds of the same to retain the payment and interest thereof to be made in such year as rental and liquidated damages for said year in which the contract is declared to be void and forfeited. And it is specially covenanted and agreed, by and between the parties hereto, that until the complete fulfillment of all the terms and conditions of this contract, that the title of all crops, hay grain, and vegetables raised and grown on the said premises shall be and remain in the party of the first part; and the party of the first part has the right to take and hold sufficient of the crop raised in any year to repay any and all advances made by the party of the first part to the party of the second part, or to any one for him. It is hereby stipulated and agreed that, upon the full and entire completion of all the conditions of this contract in the manner and at

the time stipulated, time being of the essence of this contract, the party of the first part will, upon demand therefor by the party of the second part, make and deliver their certain warranty deed to the premises, and deliver the same to the party of the second part. In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written. O. M. Omlie. Thomas O'Toole. In presence of John Fraine."

It will be perceived that this contract was not entered into with the plaintiff personally, but if, at the time of the trial, the plaintiff was entitled to its benefits,—a point not covered by the record,—the plaintiff, under its provisions, was the absolute owner of the land, and entitled to the possession therof at all times, until the contract should be fulfilled. The contract, however, provides that the defendant should have a right to enter upon the land annually for cropping purposes, and for such purposes the relation of the parties was that of lessor and lessee, and the contract was one of rental as to the annual crops to be raised by the defendant, although ultimately it was a contract of purchase and sale. The contract clearly contemplates that the defendant shall carry on his farming operations upon the land, and raise crops thereon, during the continuance of the contract; nor is there a stipulation in the agreement requiring the defendant to deliver or turn over to the lessor said crops, either in whole or in part, by way of rental or as installments on the purchase money for the land. It is true that under the contract the lessor has the right, conditioned upon the happening of certain events specified in the instrument, to take possession of crops, but there is no general right to the possession thereof secured to the lessor by the instrument. But, on the contrary, the contract evidently secures to the lessee the general right to the possession, and also the right to own and sell the crops, so long as he complies with the terms of the contract with respect to payments of purchase money. Under these circumstances, the general right of the defendant to the possession of the annual crops cannot be terminated until it is first shown that the contingencies, or some of them, upon which such right may be lost, have actually occurred. In other words, the lessor's right to the possession of such crops is conditional, and not absolute, and therefore the lessor would have the burden at the trial of showing the existence of the conditions named in the instrument. The record before us fails to disclose whether these conditions precedent to the right of possession were shown to exist, but, as this is a matter of evidence merely, the record will not permit this Court to rule upon the points suggested. But this record discloses that the defendant offered testimony at the trial tending to establish a state of facts which, if satisfactorily established, would wholly defeat the plaintiff's right of recovery under this instrument. This evidence was excluded, and the defendant has preserved an exception to the ruling. The defendant testified that he had raised the grain on the land in question, and that no demand therefor had ever been made upon him. He further testified, without objection,

as follows: "I have a suit pending with reference to the title of this land, in which I claim to be the owner of this land, against Omlie and Lane." The witness continued: "Mr. Lane never raised any crop on this land. I entered into a contract with reference to this land. Q. Did you ever start in and act on that contract,—I mean the one as to renting or leasing?" The plaintiff objected to this question as immaterial, incompetent and irrelevent; also on the ground that the answer might tend to contradict the terms of a written instrument. This objection was sustained, and the evidence was excluded. Defendant next offered to prove, by the same witness, that there was an understanding between the parties to this contract that the same should not be acted upon, and that defendant had been holding adverse possession of the land in question for 16 years, as against the plaintiff and all the world. This offer of testimony was excluded also, and upon the ground above stated. We are clearly of the opinion that these rulings involve error prejudicial to the defendant. It was essential to the plaintiff's case to show that the grain in question was raised by the defendant pursuant to the terms of the instrument under which the plaintiff sought to recover possession, and hence any evidence tending to establish this fact, or to disprove its existence, was directly pertinent to the isues. To disprove this fact, and show that plaintiff's contract gave no rights to the plaintiff, would defeat the recovery. When asked by his counsel whether he ever started in and acted on the contract, the defendant was not allowed to answer the question, and when the defendant offered to prove, by the same witness, that there was an understanding arrived at between the contracting parties, under which the contract was never acted upon, it was rejected at the instance of counsel for the plaintiff.

No one can anticipate what state of facts would have been developed if this testimony had been permitted to come into the case. But it certainly was proper for the defendant to show, by any competent and satisfactory evidence, that the grain in question was not raised under or pursuant to the terms of the contract. This could have been done by showing that the contract had itself been terminated by mutual consent, before the crop in question was planted; or by showing that after the execution of the contract, a new arrangement had been made between the contracting parties, whereby the terms of the contract had been superseded; or that some new arrangement had been made, under which defendant had raised the crop in question. The case of *O'Toole* v. *Omlie* (decided by this Court at the present term) 8 N. D. —, was pending in the District Court when the action at bar was being tried in the court below. In said other action it was decided, for reasons set out in the opinion of this Court, that the lease and sale contract in question here estopped Thomas O'Toole from asserting title to the land as against Lane, but it was further expressly held in that case that Lane took title from Omlie with full notice and knowledge of the existence and terms of said contract. Each case stands in this Court upon its

own issues and upon its record as made in the court below. Nothing is decided n this case which is in conflict with our decision in the other case. For the error involved in excluding the testimony above mentioned the verdict will be vacated, and a new trial granted. All the judges concurring.

(78 N. W. Rep. 77.)

O. S. PAULSON MERCANTILE COMPANY *vs.* W. K. SEAVER.

Opinion filed December 18, 1898.

Evidence—Declarations—Estoppel.

S. transferred certain personal property to P. by bill of sale. P., in same manner, transferred the same property to plaintiff. The defendant, as sheriff, and by virtue of a writ of attachment duly issued and placed in his hands for service, seized said property as the property of S. Plaintiff sued the sheriff in conversion. *Held*, that the declarations of S., made after the transfer to plaintiff, tending to defeat plaintiff's title, were improperly received in evidence against plaintiff's objections, in the absence of any proof of any combination between S., P., and plaintiff to defraud the creditors of S.

Silence When Duty to Speak—Estoppel.

Where such statements were made by S. in the presence of P., who was the president and general manager of plaintiff, and had possession and control of said property as such, and where such statements were made to an agent of the creditor of S., who subsequently sued out the attachment, that it was the duty of P., as such officer, to contradict such statements if untrue, and his remaining silent constituted an admission of the truth of such statements, and rendered them competent evidence against plaintiff.

Declarations as to Title to Personal Property.

When, at the same time and under the same circumstances, P. stated to such creditor's agent that S. was owner of said property, such statement became competent evidence against plaintiff.

Appeal from District Court, Traill County; *McConnell*, J.

Action by the O. S. Paulson Mercantile Company against W. K. Seaver as sheriff of Traill county, for the conversion of a stock of merchandise, held by the defendant under a seizure upon warrant of attachment in an action by L. A. Shakman & Company against one O. S. Sletto. The trial resulted in a verdict for defendant. From an order granting a new trial, defendant appeals.

Affirmed.

Bangs & Guthrie, for appellant.

The only error upon which a new trial was order by the lower court was the admission of evidence of statements made by Sletto and Paulson with reference to the ownership of the stock in question. These men were associated for the illegal purpose of defrauding Sletto's creditors, and the admissions of one of them during the

pendency of the unlawful enterprise and in furtherance of its objects, were competent against the other. 1 A. & E. Enc. L. (2nd Ed.) 711; Underhill Ev. 69; *Sundry Goods* v. *United States*, 7 L. Ed. 450; *Nudd* v. *Burrows*, 91 U. S. 426, 23 L. Ed. 286; *McKean* v. *Adams*, 32 N. Y. Supp. 281; *Guneberg* v. *Truesch*, 61 N. W. Rep. 872. The admissions made by duly authorized agents of corporations are looked upon as the admissions of the corporation. 2 Whart. Ev. 1170; *Toll Bridge Co.* v. *Bettsworth*, 30 Conn. 380; *Abbott* v. *Co.*, 25 Pac. Rep. 693; *Chicago, etc., Ry. Co.* v. *Coleman*, 68 Am. Dec. 544; *McGinness* v. *Adriatic Mills*, 116 Mass. 177; *Costigan* v. *Company*, 38 Mo. App. 218; *St. Louis Paint Mfg. Co.* v. *Mepham*, 30 Mo. App. 15; *Josephi* v. *Clothing Co.*, 33 Pac. Rep. 1. The declarations made by an officer or agent of a corporation in response to timely inquires relating to matters under his charge in respect to which he is authorized in the usual course of business to give information may be given in evidence against the corporation. *Bank* v. *Field*, 2 Hill 445; *Morse* v. *Ry. Co.*, 6 Gray 450; Abbott's Trial Ev. 44; *Xenia Bank* v. *Stewart*, 114 U. S. 224.

McLaughlin & Boyesen, for respondent.

There was no allegation of fraud, collusion or conspiracy in the answer and all evidence to prove either was inadmissible. *Frisbee* v. *Langworthy*, 11 Wis. 394. New matter constituting a defense must be plead. Subd. 2, § 4914 Rev. Codes. New matter is that which under the rules of evidence the defendant must affirmatively establish. If the onus of proof is thrown upon the defendant, the matter to be proved by him is new matter. *Percy* v. *Sabin*, 10 Cal. 22. Fraud is never presumed. It is an affirmative defense. *Glazer* v. *Clift*, 10 Cal. 304; *Mey* v. *Gulleman*, 105 Ill. 272. The facts constituting the fraud must be stated. Bliss on Code Pleading, § 211-239; *Ockenden* v. *Barnes*, 43 Ia. 619; *Finley* v. *Quirk*, 9 Minn. 194. It was neither alleged in the answer nor proved that L. A. Shakman & Company were creditors of O. S. Sletto. As between the parties the sale by Sletto to plaintiff was good against any but creditors of plaintiff's vendors at the time of the transfer. *Braley* v. *Byrnes*, 20 Minn. 435; *Hornberger* v. *Bradenberger*, 35 Minn. 401; *James* v. *Van Duyn*, 45 Wis. 512; *Daman* v. *Bryant*, 2 Pick. 411; *Hines* v. *Chambers*, 29 Minn. 7; *Williams* v. *McGrade*, 13 Minn. 46; *Howard* v. *Manderfield*, 31 Minn. 337; *Oberfelder* v. *Kavanaugh*, 32 N. W. Rep. 295; *Williams* v. *Eikenbury*, 41 N. W. Rep. 770; *Bartlett* v. *Cheesebrough*, 49 N. W. Rep. 360; *Paxton* v. *Moravek*, 47 N. W. Rep. 919. Declarations to third persons by a vendor of property after the sale and delivery thereof has been consummated are inadmissible against the vendee to impair the latter's title. *Orr* v. *Lindsay Shoe Co.*, 67 Fed. Rep. 990; *Zobel* v. *Bauersachs*, 75 N. W. Rep. 43. Such declarations are both irrelevant and hearsay. *Winchester, etc.* v. *Creary*, 116 U. S. 161; *Kurtz* v. *Ry. Co.*, 63 N. W. Rep. 1; *Milling* v. *Hillenbrand*, 40 N. E. Rep. 941; *Williams* v. *Eikenbury*, 41 N. W. Rep. 770;

Howland v. *Fuller,* 8 Minn. 50; *Zimmerman* v. *Lamb,* 7 Minn. 336; *Benson* v. *Lundy,* 3 N. W. Rep. 149; *Allen* v. *Kirk,* 47 N. W. Rep. 906; *Derby v. Gallup,* 5 Minn. 119; *Shaw* v. *Robertson,* 12 Minn. 445; *Groff* v. *Ramsey,* 19 Minn. 44; *Burt* v. *McKinstry,* 4 Minn. 204; *Buckingham* v. *Taylor,* 41 N. W. Rep. 868; *Fay* v. *Rankin,* 2 N. W. Rep. 562. Declarations of an agent of a corporation to bind the principal must be made within the scope of the agent's authority and must accompany the act or contract which he is authorized to do or make. Angel & Ames on Corp. §309; *Mundhenk* v. *Railway Co.,* 11 N. W. Rep. 657; *Verry* v. *Railway Co.,* 47 Ia. 549; *Sioux Valley State Bank* v. *Kellogg,* 46 N. W. Rep. 859; *Met. Nat. Bank* v. *Bank,* 74 N. W. Rep. 28.

BARTHOLOMEW, C. J. The plaintiff, the O. S. Paulson Mercantile Company, is a corporation. As such, it sues the defendant, Seaver, in conversion for the value of a certain stock of goods which was in a store building at Reynolds, in Traill county. It alleges that it was the owner of said stock, and that the defendant wrongfully seized and converted the same. The defendant, by answer, denies plaintiff's ownership and damages, and stated that, as sheriff of said Traill county, he seized said stock of merchandise under and by virtue of a writ of attachment duly issued out of the District Court of said county, and placed in his hands for service, in an action brought by A. L. Shakeman & Company against one O. S. Sletto to recover the value of certain merchandise sold by said Shakeman & Co. to said Sletto; that he seized said stock of goods as the property of said Sletto; and that he, the said Sletto, was in fact the owner of said stock of goods when the same was so seized. A trial resulted in a verdict for defendant. Subsequently plaintiff moved for a new trial, and one of the grounds of such motion was errors of law occurring at the trial and excepted to by plaintiff. The Court granted the motion, and the order stated: "The same is hereby granted upon the sole ground of error in law occurring at the trial in admitting in evidence, over the objection of plaintiff's counsel, certain testimony as to statements made by O. S. Sletto and O. S. Paulson with reference to the ownership of the stock in question." From this order defendant appeals. To understand the full force of the ruling, it will be necessary to state some facts. The plaintiff corporation received its charter about October 25, 1894. At that time, and for more than a year prior thereto, O. S. Sletto had been conducting a general merchandise business in the City of East Grand Forks, in the State of Minnesota. Commencing on September 10, 1894, and at various dates from that time to October 25th, large quantities of goods were shipped by O. S. Sletto from East Grand Forks, billed to himself at Reynolds. On October 9th and 24th, and on November 2nd and 5th, small shipments were made from East Grand Forks by O. S. Sletto to O. S. Paulson at Reynolds and during the month of October some shipments of goods from wholesale houses were received at Reynolds, billed to O. S. Sletto. All goods received at Reynolds billed to Sletto were taken

by O. S. Paulson, and receipted for by him in Sletto's name, and were placed in a storeroom in Reynolds, and constituted practically the stock of goods that was seized by defendant. These goods were being sold at retail. Until about November 1st the business was conducted in the name of O. S. Paulson, and was in his personal charge. After that date it was conducted in the name of the O. S. Paulson Mercantile Company; O. S. Paulson as president and general manager, continuing in charge. On October 31, 1894, O. S. Sletto executed to O. S. Paulson, for the stated consideration of $3,500, a bill of sale of goods in the store at Reynolds. On the same date, for the expressed consideration of $565, Sletto executed a bill of sale to the O. S. Paulson Mercantile Company of certain other goods in said store. The bills of sale were filed for record November 5, 1894, and at the same time there was filed a bill of sale from O. S. Paulson to O. S. Paulson Mercantile Company, covering same goods, for the expressed consideration of $5,000. It was defendant's contention that the sale from Sletto to Paulson was fraudulent and collusive, and made for the sole purpose of defrauding Sletto's creditors, and the organization of the corporation by Paulson was but a part of the scheme by which they hoped to introduce a third party, who might figure as an innocent purchaser of the goods. On the 6th day of November—the day following the recording of the bills of sale—one Neisser, who was the traveling salesman of A. L. Shakeman & Co., the plaintiff in the attachment suit, appeared at East Grand Forks for the purpose of ascertaining Sletto's financial condition and collecting the bill due his firm. One Fried, another traveling salesman, was with him. The depositions of these parties were taken by defendant, and introduced over plaintiff's objection. They testified that Sletto told them on that day that he owned the goods at Reynolds, and that again, and in Paulson's presence, he made the same statement, and that Paulson stated that Sletto owned the goods, and that he (Paulson) was simply in there to help Sletto out. It was upon the introduction of this testimony that the court based its order for a new trial.

We think the order must be sustained, upon the ground that the statements of Sletto, the vendor, made in the absence of the vendee, and tending to defeat the title, were improprly admitted. The general rule which excludes the statements of a vendor, not in possession, and which tend to defeat the title of his vendee, is well established. But the rule has its exceptions. After proof has been introduced to show a fraudulent combination on the part of the vendor and the vendee to defraud the creditors of the vendor, then the statements of the vendor, in the absence of the vendee, tending to defeat the title of the vendee, may be introduced. *Hartman* v. *Diller*, 62 Pa. St. 37; *Pier* v. *Duff*, 63 Pa. St. 59; *Cuyler* v. *McCartney*, 33 Barb. 165; *Boyd* v. *Jones*, 60 Mo. 454; *Hutchings* v. *Castle*, 48 Cal. 152. Just how far this precedent proof must go is not clear, under the authorities. In *Pier* v. *Duff* the Supreme Court of Pennsylvania said: "There is no doubt that if there be any, even very

slight, evidence of complicity between the grantor and grantee in a design to defraud creditors, the declarations of one are admissible against the other, although made after the date of the grant." While in *Boyd* v. *Jones* the Court said: "But in such case the common design and undertaking must first be proved by evidence aliunde, before his declarations are admissible." If, in these cases, the Court acted upon different rules as to the quantum of precedent proof, we are not in this case required to decide between them. If O. S. Paulson, Sletto's grantee, were seeking to recover the value of the goods in question, the point presented would be very close, under the Pennsylvania authorities. But the plaintiff is the grantee of Sletto's grantee, and at the time Sletto's declarations were received in evidence there was no proof whatever tending to connect plaintiff with any fraudulent combination to defraud Sletto's creditors; hence the declarations should have been excluded. The order granting a new trial must be sustained by reason of the admission of these declarations of O. S. Sletto, but, as the same questions will necessarily arise upon another trial, it becomes necessary to notice the other points upon which the Court based its order for a new trial.

Certain statements were received in evidence that were made by O. S. Sletto after he had executed a bill of sale of the goods in question to O. S. Paulson, and after O. S. Paulson had executed a bill of sale for the same goods to the O. S. Paulson Mercantile Company, the plaintiff herein. Such statements were made in the presence of O. S. Paulson, and were made to the agent of A. L. Shakeman & Co., to whom Sletto was indebted in a large amount, and the agent was seeking to ascertain the extent of Sletto's responsibility. We must treat these declarations as made in the presence of the corporation plaintiff. O. S. Paulson was at that time president and general manager of such corporation, and as such he was in possession of the stock of goods at Reynolds, and controlled the sale and disposition thereof, and the conduct of the business, as entirely as when it was conducted in the name of O. S. Paulson. Under these circumstances, and in the presence of Paulson, Sletto stated that he was the owner of the stock of goods at Reynolds. In this Paulson, by his silence, acquiesced. If it were true that the plaintiff owned the stock, the circumstances made it peculiarly incumbent upon Paulson to then and there so declare. If the plaintiff owned such stock of goods, an obligation rested upon Paulson, under the circumstances disclosed, to so declare in response to Sletto's statement, and he violated every rule of duty and courtesy by not so doing, and the only reasonable inference to be drawn from his silence is an admission by him, for the corporation, of the truth of the statement. In *Drury* v. *Hervey*, 126 Mass. 519, it is said that the whole rule turns on the presence or absence of the conditions just enumerated. Here the conditions were all present, and, if Paulson himself were plaintiff, the application of the rule could not be questioned. But corporations, by the silence of those who should speak for them, may make admissions as well as individuals. We

know of no rule of law giving corporations immunity in this direction. We do not hold that such admissions are conclusive. They do not work by way of estoppel, but they are competent evidence in the case. Such was the holding in *Williams* v. *College*, 29 Mo. 250. The statements of Sletto made in Paulson's presence were, under the circumstances of this case, properly admitted in evidence.

There remain yet the statements made by Paulson himself. They were made on the same day, to the same party. Paulson knew who the party was and what his business was. It would not be possible for a corporation to clothe an officer with more power than the record shows Paulson had in this case. He stated, according to the witness, that Sletto owned the stock at Reynolds, and that he (Paulson) was in there simply to help Sletto out. In his Commentaries on Corporations, Mr. Thompson thus states the rule at section 4914: "It is merely to state the same rule a little differently to say that declarations made by the officers or agents of corporations, while acting in the course of their official duties or of the business of their agency, with reference to the then existing state of affairs, are admissible in evidence as part of the res gestae." He cites abundant authority for the proposition. The statements made by the president related to a business of which he then had exclusive charge, and referred to the then existing state of affairs. That they were properly received in evidence we have no doubt; but, for the reason already stated, the order of the Court granting a new trial is affirmed. All concur.

(77 N. W. Rep. 1001.)

TERENCE MARTIN *vs.* LUGER FURNITURE COMPANY.

Opinion filed December 15, 1898.

Pleading—Amendment—Abuse of Discretion.

The authority vested in Courts under the law to allow amendments to pleadings is conferred to promote the ends of justice, and should therefore be liberally exercised by the Courts, and, in cases of reasonable doubt about the propriety of an amendment, the better and safer practice is to allow the amendment to be made. The controlling principle is, or should be, whether a proposed amendment, if allowed, would further the ends of justice. The discretion to allow or refuse amendments to pleadings is a legal, and not an arbitrary, discretion. To arbitrarily refuse to allow an amendment which should be allowed is an improper exercise of judicial discretion.

Prejudicial Error to Refuse Amendment.

Upon the state of facts set out in the opinion, *held*, that the refusal of the trial court to allow a proposed amendment to the answer was prejudicial error.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Terence Martin against Ferdinand Luger and Peter

Luger, co-partners under the firm name of Luger Furniture Company. Verdict for plaintiff. From an order denying a new trial, defendants appeal.

Reversed.

W. C. Resser and *John E. Greene,* for appellants.

Benton & Bradley, for respondent.

WALLIN, J. This case is now before this Court for a second time. See *Martin* v. *Furniture Co.*, 6 N. D. 351, 70 N. W. Rep. 1134. In the former case, which was reversed, the trial court directed a verdict for the defendants. At the second trial of the action, the court below directed a verdict for the plaintiff. The action is based upon a subscription contract, whereby the defendants agreed in writing with the plaintiff to pay plaintiff the sum of $200, as defendant's part of a subscription to a bonus for the refitting of a certain building to be used as an hotel in the City of Fargo. Defendants admit that they signed the subscription contract, and it is conceded that the plaintiff refitted the building, and converted the same into an hotel, in accordance with the terms of the subscription. The complaint, after setting out the subscription contract, alleged performance thereof on plaintiff's part, and demanded judgment for $200 and interest thereon. The defendants' answer to the complaint, so far as material, is as follows: "Defendants, further answering, allege that, at the time they subscribed the paper mentioned in paragraph 2 of said complaint, the said plaintiff, Terence Martin, as a part of said subscription, and cotemporaneous therewith, and in consideration of the said subscription, promised and agreed with the defendants to purchase of the defendants the furniture and furnishings for the said hotel, and signed, executed, and delivered to these defendants at the same time an instrument, which instrument is in the words and figures following, to-wit: 'Fargo, N. D., January 4, 1895. This memorandum is to witness that Luger Furniture Co. has this day subscribed $200.00 towards payment of a bonus to Terence Martin, or his assigns, for changing and refitting the "Argus Building," Fargo, N. D., into an hotel, upon the following conditions: That if said Martin, or Robert O'Brien, does not furnish said hotel, and if the party that does or may furnish said hotel, other than said Martin or O'Brien, does not buy furniture or furnishings from said Luger Furniture Co. to furnish said hotel, then the subscription of $200.00 above named shall be null and void, and of no effect. But if said Martin or O'Brien does furnish said hotel, if the person who may furnish same does buy the furniture from said Luger Furniture Co., then said subscription is to be and remain in full force and effect. Terence Martin.' That, relying upon the promise of the said plaintiff that he would purchase the necessary furniture and furnishings for said hotel of defendants, the defendants were induced by the said plaintiff to subscribe the said sum of $200.00, and said subscription was made solely upon the said representations and promises of the said plaintiff that he, or the

person who did furnish the said hotel, would buy the furniture and furnishings for the said hotel of the defendants, and not otherwise. That the said plaintiff did furnish the said hotel building, but, wholly neglecting and disregarding his said promise and agreement with the defendants, the said plaintiff bought of other dealers than the defendants herein the furniture and furnishings for the said hotel. Wherefore defendants demand that they be dismissed hence, with their costs." At the first trial, the District Court ruled that the memorandum set out in the answer was a contemporaneous writing, relating to the subject-matter of the subscription contract, and as such was to be construed as part and parcel of the subscription contract, and, so construing it, the District Court held that the same was a stipulation which released the defendants from their obligation to pay the subscription, in the event that plaintiff did not purchase the furniture for the hotel of the defendants, or procure some one else to do so. In construing the memorandum, the District Court at the first trial held that plaintiff, who, as is conceded, had furnished the hotel himself, and had not purchased any part of the furniture of the defendants, could not recover, and accordingly directed a verdict in favor of the defendants. On appeal, this Court took an opposite view of the memorandum, and ruled that the same did not, when properly construed, release the defendants from their obligation to pay the subscription upon the event of the failure of the plaintiff to purchase the hotel furniture from the defendants. After the record was transmitted to the court below, other proceedings were taken in the District Court, and the same are embraced in the record now before this Court. From this record it appears that the defendants made three several applications in the court below to amend their answer. These applications were all denied, and the rulings thereon are assigned as error in this Court. In their first application to amend, the defendants sought to so reform said written memorandum as to make it correspond to and support the alleged agreement pleaded in the answer, to the effect that plaintiff agreed unconditionally to purchase the hotel furniture of the defendants, and that such agreement was the sole consideration of the subscription contract entered into by the defendants. This proposed amendment being disallowed, the defendants next applied for leave to amend their answer in such a way as to wholly eliminate therefrom said written memorandum. This was also denied, and subsequently the defendants sought to amend in manner and form as they had offered in their first application to amend. This offer was also overruled, and the case went to trial on the original pleadings, and resulted in a directed verdict in favor of the plaintiff, after excluding defendants' oral evidence. A new trial being denied, the defendants appeal from the order denying the same.

The question presented upon said assignments of error is whether such refusals to allow the amendments to the answer were a proper exercise of the discretion vested in the trial court with respect to the allowance or disallowance of amendments to pleadings. It is

elementary that the granting or refusing to grant amendments to pleadings is a matter lying largely within the discretion of the trial court; but it is equally well settled that such discretion means a legal, and not an arbitrary, discretion. See *Stringer* v. *Davis,* 30 Cal. 318, and *Smith* v. *Water Co.,* 14 Cal. 201. And this Court has recently held that an improper refusal to allow the plaintiff to amend his complaint was, under the circumstances of the case cited, an abuse of discretion. See *Anderson* v. *Bank,* 5 N. D. 80, 64 N. W. Rep. 114. The general rule governing the allowance of amendments to pleadings has been well stated by Chief Justice Sawyer, in *Kirstein* v. *Madden,* 38 Cal. 162, in the following language: "From oversight of counsel, committed under pressure of business, pleadings are often defective. In such cases, when an offer to amend is made, at such a stage in the proceedings that the other party will not lose an opportunity to fully present his whole case, amendments should be allowed with great liberality." In *Hayden* v. *Hayden,* 46 Cal. 334, the Court say: "Undoubtedly, courts should be liberal in allowing amendments, to the end that cases may be fully and fairly presented upon their merits, and that equal and exact justice may be done between the parties." In the light of the well-established priciples enunciated by these cases, it is difficult to understand upon what legal theory the application to amend the answer was denied. The refusal to permit an amendment of the answer, in its practical effect, precluded all inquiry extraneous to the writings, and this ruling also led to a directed verdict. It is manifest to this Court that if the original answer had been amended by eliminating therefrom the written memorandum set out in the answer, the issues would have been thereby greatly clarified and broadened; and, as a consequence, the ends of justice would have been promoted by such amendment. The record discloses that the attitude of the defendants, with respect to the memorandum incorporated in their answer, has undergone a complete and radical change since the same was construed by this Court and the record sent down for a new trial. Their present attitude is that the memorandum is not a contract at all, for the reason, as defendants claim, that they have in no manner assented to its terms. If the defendants can establish this claim by competent evidence, the memorandum will be stripped of its character as a contract, and will, in that event, be only an ex parte version of the terms of a certain arrangement confessedly made between the parties concerning the purchase of the hotel furniture, and, as such, would not, if admissible in evidence, be conclusive upon the question of what the arrangement really was touching the purchase of the furniture. But counsel for the respondent strenuously urge that the defendants are estopped from making their proposed change of attitude with respect to the memorandum, because they have incorporated the same in their original verified answer, and thereby assumed that the same was not only a contract, but one of such a character as was decisive of the case in their favor. The argument of counsel is that a suitor cannot be

permitted to assume positions in a lawsuit which are directly antagonistic to each other, and that to allow this to be done would, in effect, be to countenance bad faith in a suitor. This position is certainly plausible, and, abstractly considered, is unassailable; but it may, we think, in this case, be answered in part by the fact—as disclosed by the answer—that defendants have not directly alleged that the memorandum embraces the arrangement made by the parties respecting the purchase of the furniture. The answer sets out the alleged arrangement as to the furniture, and then proceeds to aver that the plaintiff "signed, executed, and delivered to these defendants, at the same time, an instrument, which instrument is in the words and figures following, to-wit" (setting out the memorandum). But it must be conceded that the record in the former case does clearly show that the defendants then assumed that the memorandum had the force and effect of a binding contract, and sought to derive an advantage from it as a contract. It is likewise true that this Court, on the first appeal, in construing this memorandum, assumed that it was a contract. This assumption, however, was made by this Court simply because both parties then claimed that the instrument was a contract, and one which was decisive of the case; and not a suggestion was made by either counsel, on the former appeal, to the contrary. The memorandum, as so construed by this Court, when applied to the conceded facts in the record, operated decisively against the interests of the defendants, and practically insured their defeat in the action; and we still adhere to this construction, if the instrument has the force of a contract. To avoid this result, defendants asked leave by an amendment, to eliminate the memorandum from their answer, and thereby lay the foundation to prove that the memorandum in question never was intelligently and consciously assented to by them, and hence never was a contract at all. This request, as we have seen, clearly involved a radical change of front on the part of the defendants, but we are constrained to hold that this change does not necessarily involve bad faith on defendants' part. It should be remembered that not only the defendants, but their counsel as well, assumed that the memorandum signed by the plaintiff, and delivered by him to the defendants, embodied the agreement with respect to the purchase of the furniture which is pleaded elsewhere in the answer. The trial court was of the same opinion, and, acting upon that theory, at the first trial, directed a verdict in favor of the defendants. It was an excusable mistake, therefore, for the defendants to assume, as they did, that the memorandum embodied what they allege to be the true agreement between the parties, and upon this assumption to incorporate the same in their original answer, as was done. It was only when the parties learned that the memorandum, as judicially interpreted, must be construed adversely to the interests of the defendants, that it became necessary for the defendants to show that it was not their agreement. Until construed by this Court, all parties

were content to assume that the instrument should stand as a contract; but the defendants now insist that the true contract is not contained in the memorandum, as now construed, but is distinctly alleged in the answer by averments independent of the memorandum, and that they never assented to the memorandum as a contract, except upon the theory and supposition that the same embodied what they claim is the true contract, as alleged in the answer, by averments therein aside from the instrument itself. The defendants, in their new attitude, contend that the instrument was incorporated in the answer, and relied upon as a defense, under the mistaken idea that the same embodied the true agreement, viz: that pleaded in the answer, by allegations therein distinct from the memorandum. The memorandum is unilateral, and it is not authenticated by the signatures of the defendants. If it is their contract, it became such only by virtue of their assent to its terms, either in words or by their conduct. Whether defendants ever assented to its terms, either orally or by their conduct, is a fact which can only be established by the introduction of evidence of the circumsances and concomitant facts connected with the entire transaction, including the making and delivery of the memorandum. This question, we think, is a question to be determined by a jury under proper instruction from the Court, and, if the fact is established that the memorandum was, without fraud on plaintiff's part, deliberately assented to by the defendants, the duty of construing its provisions will, of course, then devolve upon the Court. But the preliminary and crucial question is whether the terms of the instrument were ever assented to by both parties. It should be kept in view that the action is based wholly upon the subscription contract, which is a separate writing, and that the memorandum pleaded in the answer is only important in so far as it bears upon the matter of the alleged consideration for the subscription contract. Defendants contend and allege that the sole consideration for their subscription was the alleged unconditioned agreement to purchase the hotel furniture of them. Plaintiff's position is that the agreement as to the furniture is contained in the memorandum, which it is admitted plaintiff drew up and signed, and delivered to the defendants. The real controversy, therefore, and the only question left for solution, is as to the terms of the arrangement made by the parties respecting the matter of the furniture. In our opinion, the door should be thrown open so as to allow the fullest investigation of this pivotal question. If the memorandum is a contract, made without fraud, that fact, when ascertained, will practically settle the case in plaintiff's favor. If it is not, the question will then turn upon parol testimony. See 1 Greenl. Ev. (14th Ed.) § 284. In any event, the principel question of fact is for a jury. Under all circumstances surrounding the case, we are of the opinion that it was prejudicial error to refuse to

allow an amendment to the answer, by eliminating therefrom the memorandum. For this error, the verdict will be set aside, and a new trial awarded. All the judges concurring.

(77 N. W. Rep. 1003.)

NAPOLEON BENOIT *vs.* JOSEPH REVOIR.

Opinion filed December 7, 1898.

Justice of the Peace—Delay in Rendering Judgment.

Under section 6683, Rev. Codes, a justice of the peace has authority to hold a case open for 24 hours for the purpose of considering questions that have been submitted to him in the case.

Security for Costs—Deposit—Waiver.

Where, by consent of parties, a nonresident plaintiff in Justice's Court deposited with the Court an agreed sum of money in lieu of security for costs, the defendant is not entitled thereafter, and upon a change of venue to another justice, to demand other security for costs.

Submitting to Jurisdiction by Invoking Its Aid.

On plaintiff's application, based upon an affidavit, and over defendant's objection, a justice continued a case for the purpose of procuring testimony. The affidavit was insufficient in matter of substance. Without deciding that the justice thereby lost jurisdiction, but assuming such to be the case, we hold that when the defendant appeared on the adjourned day, and, without withdrawing his general appearance, attempted to appear specially, and moved the Court to dismiss the case for want of jurisdiction and because there was no security for costs, and when, this being overruled, he made further motions in the case, and participated in a trial on the merits, he thereby restored jurisdiction of the person, if the same had been lost.

Wallin, J., dissenting.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by Napoleon Benoit against Joseph Revoir. A judgment for plaintiff was affirmed in the District Court, and defendant appeals.

Affirmed.

Anderson & Burr, for appellant.

Charles Argall, for respondent.

BARTHOLOMEW, C. J. From a judgment against him entered in Justice Court, the defendant appealed to the District Court upon questions of law alone. There the judgment was affirmed, and he now appeals to this Court. The judgment must be affirmed again. The action was brought before a justice in the City of Grand Forks, and the pleadings were filed, and a garnishee, who had been summoned, disclosed certain indebtedness to defendant. Defendant moved for security for costs. The motion was granted, and by

agreement of parties the plaintiff deposited in court a certain sum of money as security. Defendant moved for change of venue, and the case was sent to Justice Brown, in Grand Forks. Before that justice, plaintiff moved for a change of venue, and the case was sent to Justice Richards, in a country township. Said justice, by proper notice, set the case for November 16th, 1897 at 2 o'clock p. m. When the case was called the parties appeared by their respective attorneys. The defendant objected to any further consideration of the case until the amount disclosed by the garnishee was paid into court, and until the money that had been deposited with the first justice as security for costs should be deposited in Justice Richard's court. The docket entry reads, "Upon the above objections this court holds this case open until November 17, 1897, at 2:30 p. m., for consideration." The defendant objected to this for the reason that it was not one of the statutory grounds for postponement. His objection was overruled. On the 17th he appeared and moved to dismiss on the ground that the justice had lost jurisdiction by thus holding the case open. The overruling of this motion is the subject of his first assignment of error in this Court. It must be overruled. The case was not continued. It was simply held open to give the justice time to consider the objections that had been made. Section 6683, Rev. Codes, which authorizes an intermission not to exceed 24 hours during the trial, was intended to cover just such a case as this.

Defendant then moved for security for costs. A denial of this motion is the subject of his second assignment of error. It is without merit. Security had been given in the manner agreed upon. By depositing the money in court, plaintiff lost control of it. If it had not found its way into the hands of Justice Richards, plaintiff was not to blame.

Plaintiff moved, on affidavit of the attorney for a continuance for five days, for the purpose of taking depositions in Minnesota. Defendant objected to the sufficiency of the affidavit, but the motion was granted. This is assigned as error. It will not be necessary to set forth the affidavit. The objection to it is that it fails to show that due diligence had been exercised to procure the attendance of the witness, or his testimony. The application for continuance must have been made under section 6650, Rev. Codes, and that section requires that the affidavit shall show diligence. The continuance was asked for the purpose of taking the disposition of the plaintiff, and the affidavit stated that he was a nonresident of this state, and resided in Polk county, in the State of Minnesota. There are no allegations showing that any thing had been done towards obtaining such disposition. We think the Court was not justified in assuming, from the mere fact of nonresidence, that ordinary diligence might not have secured the testimony. The affidavit was deficient on the point of diligence. The continuance ought not to have been granted.

On the day to which the case was continued, the defendant,

without withdrawing his general appearance in the case, or offering to withdraw it, attempted to appear specially, and moved to dismiss the case on the ground that, by granting the continuance without sufficient cause shown, the justice lost jurisdiction of the case, and that there was no security for costs. The motion was denied, and this ruling is assigned as error. For the purposes of this case, we will concede that he was in a position to raise a question of jurisdiction. Yet we find it unnecessary to decide whether or not this justice lost jurisdiction as claimed, because it is clear to us that, if jurisdiction was so lost, the defendant, by his own conduct, immediately restored it. The motion to dismiss was based upon two grounds. One denied jurisdiction, and the other invoked jurisdiction. The two were utterly inconsistent. By asking the Court at that time to exercise jurisdiction in the case by passing upon the matter of security for costs, complicated as it was by the fact that by consent money had once been deposited in lieu of security, the defendant estopped himself from thereafter asserting that the Court was without jurisdiction. Further, the defendant objected to receiving oral testimony, and, that being overruled, he at once proceeded to a trial on the merits; and when he appealed from the judgment that was rendered against him, while his appeal was upon questions of law only, instead of confining himself to jurisdictional questions, he not only assigns error in not sustaining a motion for security for costs, as already stated, but his further alleged error is the refusal of the Court to grant his motion to dismiss, one of the grounds of which was that there was no security for costs,—thus asking the District Court to pass upon the ruling of the justice upon a nonjurisdictional question submitted to the Justice Court by defendant after, as he now claims, that court had lost jurisdiction. On this point, see *Lyons* v. *Miller*, 2 N. D. 1, 48 N. W. Rep. 514. We are clear that, if jurisdiction was lost by the continuance, it was fully restored by defendant's subsequent voluntary acts. This ruling is not in conflict with the case of *Miner* v. *Francis*, 3 N. D. 549, 58 N. W. 343. We held in that case that where the summons was fatally defective, and the defendant appeared specially, and moved to dismiss upon that ground alone, and, the motion being denied, he answered, but specially reserved all his rights under the motion, and on appeal to the District Court he appealed only as to the question of jurisdiction, he had not by his conduct waived any of his rights. But the vital difference between that case and the one at bar is apparent on statement. The judgment of the District Court is affirmed.

YOUNG, J., concurs.

WALLIN, J. (dissenting). The application for a continuance was made under section 6650, Rev. Codes, to enable the plaintiff to procure a deposition. The Court, in the majority opinion, says: "We think the Court was not justified in assuming, from the mere fact of nonresidence, that ordinary diligence might not have se-

cured the testimony. The affidavit was deficient on the point of diligence. The continuance ought not to have been granted." In this view I fully concur. The affidavit obviously omitted to state any fact tending to show diligence in procuring the plaintiff's testimoney, and this despite the fact that a considerable time had then elapsed after issue had been joined in the action. The majority say, "The continuance ought not to have been granted," but do not state why, nor point out the consequences resulting from this confessedly erroneous ruling. The facts, however, in my view, require a distinct ruling on this point. In my judgment, the justice of the peace by such continuance then and there devested himself of all further jurisdiction of the parties. In this state the matter of adjournments in Justice Courts is made the subject of minute statutory regulations, and with respect to adjournments to procure testimony the statutory requirements are explicit. Among these is a showing of diligence. In the absence of this showing the justice was powerless to grant the postponement of the trial. An affidavit was filed, it is true, but it was defective in a vital particular. In it there was absolutely nothing in the nature of a showing of diligence upon which the discretion of the justice could be called into exercise. Hence the justice, in granting the motion and continuing the case, acted without authority to do so. The rule sustained by the decided weight of authority is that a justice of the peace has no lawful right to grant continuances, other than that conferred by the statute. This is especially true in a state where, as in this state, the matter is fully covered by statutory provisions. See 4 Enc. Pl. & Prac. p. 892, and cases in the notes; also Rev. Codes, § § 6644-6651. Nor is such error a mere irregularity, or error without prejudice. On the contrary, it is a jurisdictional error. See *State* v. *Gust,* 70 Wis. 631, 35 N. W. Rep. 559; *Scullon* v. *George,* 65 Mich. 215, 31 N. W. Rep. 841; *Whaley* v. *King,* 92 Cal. 431, 28 Pac. Rep. 579; *School District* v. *Thompson,* 5 Minn. 280 (Gil. 221); *Board* v. *McCoy,* 1 Minn. 100 (Gil. 78); *Village of Vicksburg* v. *Briggs,* 85 Mich. 502, 48 N. W. Rep. 625; *Redford* v. *Snow,* 46 Hun. 370. These cases assert a rule which seems to be both sound and logical, in holding that an unauthorized adjournment by a justice of the peace operates to discontinue the case and oust the jurisdiction. Nor do the majority of the Court hold differently. They simply state that the adjournment ought not to have been granted, without stating the results of the adjournment. But it must follow, if the Court lost jurisdiction by adjourning the case for five days, that when the Court, on the adjourned day, assumed to call the case and proceed therein, it was wholly without jurisdiction, *i. e.* without authority to open the case for any purpose. Upon this important feature the Court, in its opinion uses this language: "We find it unnecessary to decide whether or not this justice lost jurisdiction as claimed, because it is clear to us that, if jurisdiction was so lost, the defendant by his own conduct immediately restored it." In support of this assump-

tion the majority did not deem it necessary to cite a single adjudicated case. It may be safely conceded, however, that in some jurisdictions it is held that where a defendant appears specially in a justice's court, and moves to dismiss the action for want of jurisdiction over the person of the defendant, and such motion is improperly denied, a general appearance by the defendant thereafter will operate to confer jurisdiction over the defendant's person. Upon this question of practice there has been much diversity of judicial opinion. In this state, however, the matter, as I think, has been set at rest in a case in which the point was controlling, and was very carefully considered by this Court. The point was first raised in *Lyons* v. *Miller*, 2 N. D. 1, 48 N. W. Rep. 514; but it was not disposed of in that case, for the reason that the Court held that the defendant, having appealed to the District Court from a judgment against him upon questions of fact as well as law, and having demanded a new trial in the District Court on the merits, had by so doing voluntarily waived the jurisdictional question over his person. There the defendant himself had invoked the trial on the merits in another tribunal, and did not limit his appeal to questions of law,—citing *Seurer* v. *Horst*, 31 Minn. 479, 18 N. W. Rep. 283, in support of this holding. But in the North Dakota case this Court used this language: "Whether the defendant, by pleading and litigating the case on the merits, waived his objection to the Court's jurisdiction over his person, made before he had appeared specially, it is not necessary for us to decide." But in the case of *Miner* v. *Francis*, 3 N. D. 549, 58 N. W. Rep. 343, the point again arose, and was, in my opinion, squarely decided. In that case the summons was fatally defective, and defendants, appearing specially, moved to dismiss the action on that ground. The motion was denied, whereupon the defendants answered the complaint, and judgment was rendered against them by the justice of the peace upon the merits. From this judgment defendants appealed to the District Court upon questions of law only. At that time, as now, the statute permitted an appeal either upon questions of law or a general appeal for the purposes of a new trial on the merits in the District Court. In this Court it was contended by the very able counsel for the respondent that the defendants, by their "general appearance" made after their motion to dismiss had been overruled, "conferred jurisdiction." In that case we held that the defendants' general appearance by answer was not voluntary, and that, as the appeal was upon questions of law only, the appeal did not itself confer jurisdiction over the person of the defendant, in support of which holding the Court cited a line of authority to which I now refer, without further citation of cases.

In the case at bar the defendant, fully understanding that the Justice Court by its erroneous adjournment had lost jurisdiction of the case, and anticipating that proceedings in the action would be resumed upon the adjourn day, appeared before the justice on that day. But for what purpose did he appear, and in what man-

ner did he then appear? This vital question receives an explicit answer from the record made by the justice, which is as follows: "November 23, 1897, 2:30 p. m. Case called. All parties present. The defendant appears specially to object to the jurisdiction of the Court on the ground that the Court has lost jurisdiction of the case. Court overruled the objection. Defendant excepts." Defendant made no further special appearance in the action, but, without appearing specially, defendant's counsel subsequently moved to dismiss the action on another ground, relating to security for costs, and also made objection to the introduction of testimony. But testimony was introduced, and judgment was entered thereon in favor of the plaintiff. From this judgment defendant appealed to the District Court upon questions of "law alone," under chapter 7, Laws 1897. Defendant's notice of appeal specified four rulings made by the justice as embracing questions which defendant sought to have reviewed by the District Court. These may be stated briefly: First, the ruling adjourning the case as above stated; second, the ruling under said special appearance, denying defendant's motion to dismiss for the reason that the justice had lost jurisdiction; third, a general objection that the justice erred in not granting defendant's motion,—which last seems to be a mere repetition of the first; finally, the ruling denying defendant's motion to dismiss for want of security for costs. It will be observed that all of these questions are not only matters of law, but relate to the jurisdiction of the justice. Three of them are based upon the matter of the adjournment, and the other rests upon an independent ground, which I concede is insufficient, but which nevertheless was, as the record shows, assigned as a ground of dismissal in the justice's court. The notice of appeal did not refer to the ruling upon the admission of evidence. Upon this record the question is presented whether the jurisdiction of the justice, lost by the unauthorized adjournment, was voluntarily restored by any subsequent act upon the part of the defendant. The authorities above cited abundantly show that the jurisdiction was lost by the adjournment; and for the purposes of this case the majority of the Court, in the opinion of the Court, concede that jurisdiction was lost by such adjournment. The decision of this Court above cited (3 N. D. 549, 58 N. W. Rep. 343) is, in my judgment, decisive upon the point that where the defendant, for the correction of errors, elects to appeal to the District Court upon questions of law only, such appeal does not itself indicate a voluntary acquiescence in the jurisdiction assumed over his person by the justice who entered judgment against him, but that such appeal tends directly to show to the contrary. In that case this Court uses this languarge in the opinion, on page 553, 3 N. D. and page 345, 58 N. W. Rep.: "We are at a loss to discover how the act of invoking the jurisdiction of an appellate court to correct an error in the proceedings can be construed as a waiver of such error. No case can be found to support such a doctrine." The first act of defendant's counsel on the adjourn day was guarded. He

made a special appearance, and then and there, before any other step was taken in the case, challenged the jurisdiction of the justice by a motion to dismiss on the specific ground that the justice had lost jurisdiction. Does this action on the part of defendant's counsel indicate a voluntary acquiesence in the assumed jurisdiction of the justice over the person of the defendant? The question itself compels a negative answer. At what moment, then, did the defendant voluntarily acquiese in the assumed jurisdiction of the Court over his person? The record shows that, after the motion of defendant's counsel to dismiss had been overruled, he did not leave the presence of the justice, but remained there, and interposed such obstacles as he could to prevent the unlawful entry of a judgment against his client; and among these obstacles was another motion to dismiss upon an independent ground, and also an objection to the introduction of testimony, for certain reasons not necessary to mention. Does this conduct indicate an intentional and voluntary acquiesence in the wrongfully assumed jurisdiction of the justice? I think not. We have seen that the attitude of the defendant with respect to the jurisdiction of the Court had been defined and made a matter of record by a timely motion to dismiss, guarded by a special appearance. No rule of practice can be found which made it necessary to reiterate this motion, and again make the same motion a matter of record, and thereby pile up a series of objections and rulings, all upon the single point fully covered by the original motion and the ruling thereon. In this state, as I see it, it has been definitely settled, in the case in 3 N. D., and 58 N. W. Rep., that a general appearance to the merits, made by answering the complaint after defendant's motion to dismiss had been denied, does not operate as a voluntary acquiescence in the jurisdiction of the justice over the defendant's person. If such general appearance by the defendant does not so operate, I maintain that nothing which the defendant can do in the case, short of express consent, or a demand for a new trial on the merits, can restore lost jurisdiction. Upon due consideration of conflicting judicial opinion, this Court, in the case last cited, has, I submit, deliberately settled this question of practice; and, because the principle of that case has not been applied to the analogous facts of this case, I am compelled to differ from my brethren in the disposition made of the case. In my opinion, the judgment of the District Court, affirming that of the justice of the peace, should be reversed.

(77 N. W. Rep. 605.)

LUCIUS GLYNN *vs.* CARRIE S. GLYNN.

Opinion filed December 8, 1898.

Divorce—Support of Child.

A decree of divorce was granted on the husband's application. The decree directed that the plaintiff should "provide, care for, maintain, and educate" a minor son of plaintiff and defendant, but did not change the custody of the child from where the law placed it, or direct that any special sum be applied to the purposes named. *Held*, that the decree did not change the statutory duties or rights of plaintiff touching such son.

Payments to Divorced Wife—Contempt.

Under our statute, when a divorce is granted to the husband for the fault of the wife the Court has no power to make any allowance by way of support or maintenance for the wife; and when, in such a case, the plaintiff agreed that he would pay the defendant a certain sum per month, and that an order to that effect might be entered in the decree, and the same was accordingly done, the amount so ordered to be paid was not alimony, but arose from express contract, and payment could not be enforced by an attachment for contempt.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Lucius Glynn against Carrie S. Glynn for divorce. Judgment for plaintiff. Motion to attach plaintiff for contempt in failing to pay alimony. From an order directing plaintiff to be committed until alimony was paid, he appeals.

Reversed.

Newman, Spalding & Stambough, for appellant.

This divorce was not granted for an offense of the husband, but for an offense of the wife, therefore the order of the Court cannot be sustained. § 2761, 2762, Rev. Codes; Bishop on Marriage and Divorce, § 564; *Palmer* v. *Palmer*, 1 Paige Ch. 277; *Perry* v. *Perry*, 2 Barb. Ch. 311; *Everett* v. *Everett*, 52 Cal. 383. The judgment could be enforced by execution. §§ 5500, 5501, Rev. Codes; Anonymous 12 Abb. N. C. 160; *Barber* v. *Barber*, 21 How. U. S. 582. But it cannot be enforced by a contempt proceeding. *Lansing* v. *Lansing*, 4 Lans 377; *Miller* v. *Miller*, 7 Hun, 208; *Gray* v. *Cook*, 24 How. Pr. 432.

Young & Burke, for respondent.

In divorce cases the Court will as a rule adopt an agreement entered into by the parties if just and equitable. *Daggett* v. *Page*, 28 Am. Dec. 442; *Petersine* v. *Thomas*, 28 Ohio St. 596; *Calame* v. *Calame*, 24 N. J. 440; 2 Am. & Eng. Enc. L. (2nd Ed.) 127. The Court having adopted the agreement of the parties they are concluded thereby. *Buck* v. *Buck*, 60 Ill. 242; *Storey* v. *Storey*, 125 Ill. 608; 8 Am. St. Rep. 417. So long as such a judgment remains unreversed the defendant is bound even though the judgment is erroneous. *State* v. *Jamison*, 72 N. W. Rep. 452. The wife

has been allowed alimony upon a divorce at the husband's complaint. Ex parte Perkins, 18 Cal. 60; *Pollock* v. *Pollock,* 9 S. D. 48, 68 N. W. Rep. 176; *Gaines* v. *Gaines,* 19 S. W. Rep. 292. The most common method of enforcing orders or decrees for alimony is by attachment for contempt. *Park* v. *Park,* 80 N. Y. 156; *Staples* v. *Staples,* 58 N. W. Rep. 1036; *Galland* v. *Galland,* 44 Cal. 475; *Potts* v. *Potts,* 36 N. W. Rep. 240; 1 Enc. Pl. & Pr. 437; Ex parte Hart, 94 Cal. 254; Ex parte Gordon, 95 Cal. 374.

BARTHOLOMEW, C. J. In 1895 the plaintiff brought an action in the District Court of Cass county to obtain a decree of divorce from the bonds of matrimony then and theretofore existing between plaintiff and defendant. The cause of action, as set forth in the complaint, was cruel and inhuman treatment. The defendant appeared and answered, denying all cruel and inhuman treatment on her part. On September 7, 1895, the parties, by their attorneys, entered into a stipulation as follows: "The plaintiff and defendant in the above-entitled action hereby waive findings of fact and conclusions of law upon the trial therein; and it is further stipulated that it may be ordered and decreed in said cause that the said plaintiff shall pay to the said defendant on the 1st day of each and every month, commencing with the month of November, 1895, the sum of thirty dollars ($30), during the remainer of said defendant's life, or so long as said defendant shall remain unmarried, and, further, that the said plaintiff shall care for, maintain, support, and educate the said minor child, C. Edward Glynn, issue of said marriage. And it is further stipulated that said action may be tried on the 7th day of September, 1895, and decree ordered therein on that date." On the same day the Court made an order for judgment and decree in the following language: "This cause coming on to be heard on the 7th day of September, 1895, the respective parties having stipulated that the same shall be heard upon that date, upon the complaint of the plaintiff, and the answer of the defendant, and the evidence of the plaintiff and his witnesses, adduced on the part of the plaintiff, plaintiff being represented by Newman, Spalding & Phelps, his attorneys, and present in person, and defendant being represented by Fred B. Morrill, Esq., her duly-authorized attorney, and said defendant having made a general appearance in said action by said Fred B. Morrill, and the Court thereby having acquired jurisdiction of the subject-matter in controversy and of the defendant, and the Court having duly considered the evidence adduced, and having found all the allegations in said complaint sustained by competent evidence, and the respective parties having waived findings of fact and conclusions of law, and the respective parties having stipulated that an order be entered in said cause directing that the plaintiff pay to the defendant the sum of thirty dollars ($30) on the 1st day of each and every month, commencing with the month of November, 1895, during the remainder of her life, or so long as she shall remain unmarried, and, further, that the said plaintiff shall provide for the proper maintenance and

education of the said minor child, C. Edward Glynn, the Court finds that said plaintiff is entitled to a judgment for divorce herein from the defendant herein, dissolving the said bonds of matrimony between himself and said defendant, and releasing the parties thereto, and each of them, from said bonds, and from all obligations thereof. Now, on motion of Newman, Spalding & Phelps, attorneys for said plaintiff, it is ordered that judgment be entered accordingly." On September 24, 1895, a judgment was entered in pursuance of the order, which, after the recitals, reads: "It is ordered and adjudged that the said plaintiff herein be, and he is hereby, divorced from the defendant, and the bonds of matrimony between plaintiff and defendant are hereby dissolved, and they, and each of them, are released and freed therefrom and from all obligations thereof; and the said plaintiff is directed to pay the said defendant the sum of thirty dollars ($30) on the 1st day of each and every month, commencing with the month of October, 1895, during the remainder of her life, or so long as she shall remain unmarried, and, further, that said plaintiff shall provide, care for, maintain, and educate the said minor child, C. Edward Glynn." On December 13, 1897, the District Court of Cass county issued an order on plaintiff to show cause why he should not be attached, as for contempt of court, for failing to pay alimony to defendant as directed by the order of September 24, 1895. On the return day of the order, plaintiff appeared specially, and moved to dismiss the proceedings upon the following ground: "Because the judgment in said action was in favor of the plaintiff therein, and the Court has no power to enforce a judgment for permanent alimony in favor of the defendant (the defendant not being the innocent party, as shown by said judgment) by attachment, or by any other method or proceeding other than by execution." The motion to dismiss was denied, and the matter involved in the order to show cause was submitted on its merits, each party filing affidavits. The Court entered an order declaring plaintiff guilty of a contempt of court, in failing to comply with the order requiring the payment of money, and in failing to support and educate the minor son. The Court found the sum of $580 to be in arrears, and directed that plaintiff be committed to the jail of Cass county until said sum was paid, or he was otherwise discharged according to law. From this order plaintiff brings this appeal.

We do not understand that any imprisonment was ordered by reason of plaintiff's failure to maintain, fare for, and educate his minor son, although the Court adjudges him in contempt upon that ground, also. Even in this the Court was clearly wrong. First, it does not appear that plaintiff has not fully provided for his son. The lad was 19 years old when these contempt proceedings were instituted. He had been attending an academy in Vermont. The father wrote him that he would pay his expenses, if he could, and there is nothing to show that he has not done so. True, he has not sent the money to the son, but that was not necessary. But,

further, the divorce decree did not give the defendant the custody of the son. It is not mentioned in the decree. The father is directed to "provide, care for, maintain, and educate" the son. But that duty rested upon him before. It was no stronger after it was recited in the decree, nor was the character of the duty changed. The father might still provide for and educate his son in such manner and at such place as he saw proper, provided it reasonably comported with his ability. It is undisputed in this case that the father requested the son to join him at his home, in Valley City, in this state, and offered to place him in the normal school at that place, and properly care for him. To this the defendant, or the son, or both, refused to assent. The father is not required to support the son in idleness in Vermont. The only reason that we can assign for the presence of that provision in the stipulation between the parties and in the decree is the fact that both parents were in law bound to support their minor son. The mother desired, as between themselves, to throw the entire charge upon the father, and he was willing to accept it, and so contracted. If now the mother should be required to contribute from her own means for the support or education of the son, she could undoubtedly recover the amount contributed by her from the father, by reason of his contract. If the decree had given the defendant the custody of the minor child, and directed that the father pay her a specified sum for the support and education of the child, the question would be altogether different.

Appellant contends that the amount specified in the decree to be paid by plaintiff to defendant is in no sense of the word alimony; that it is, in effect, a money judgment on contract, possessing no greater sacredness, and enforceable in no other manner, than an ordinary money judgment upon contract. After a very careful consideration of the subject, we reach the conclusion that this contention must be sustained. But, before stating the reasons which lead us to this conclusion, we note that counsel for respondent, and the Court below, seem to have fallen into the error of regarding the appellant as seeking to evade the terms of the judgment, and practically demanding a modification thereof. The case of *State* v. *Jamison* (Minn.) 72 N. W. Rep. 451, is cited in support of the ruling below. In that case a decree of divorce had been granted in favor of the wife for the fault of the husband, and the decree provided that the husband should pay the wife a certain monthly sum as alimony. He failed to pay, and was imprisoned on contempt proceedings. On review of those proceedings he contended that the judgment against him was void, because the judgment on its face showed that the defendant had no estate, real or personal, but that his ability to pay arose from the fact that he was receiving a salary, while the Supreme Court of that state had held that alimony could not exceed one-third of the estate, real and personal, of the defendant. The Court said that was simply an error, and did not render the judgment void, and the fact that the error appeared in the judgment

roll did not alter the rule; until the judgment was reversed or modified, the defendant must obey it. That was clearly right, but it does not affect this case. This appellant is not seeking to avoid the decree. He is entirely satisfied with it, but he objects to the interpretation placed upon it by the trial court. The provisions of our statute immediately applicable to the case before us are sections 2761, 2762, Rev. Codes. The first section reads: "When a divorce is granted for an offense of the husband the Court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during her life or for a shorter period as the Court may deem just, having regard to the circumstances of the parties respectively; and the Court may from time to time modify its orders in these respects." The next section contains the following: "The Court may require the husband to give reasonable security for providing maintenance or making any payments required under the provisions of this chapter and may enforce the same by the appointment of a receiver or by any other remedy applicable to the case." It will be noticed that this statute authorizes the granting of maintenance to the wife only in cases where the divorce is granted for the fault of the husband. In this respect our statute differs from that of several of the states, where the granting of alimony is left to the judgment of the Court, without reference to the party in fault. Such is the statute of New Hampshire. *Sheafe* v. *Laighton*, 36 N. H. 240. Also in Illinois. *Spitler* v. *Spitler*, 108 Ill. 120. And in Pennsylvania. *Miles* v. *Miles*, 76 Pa. St. 357. And in Iowa. *Zuver* v. *Zuver*, 36 Iowa, 190. And in Massachusetts. *Graves* v. *Graves*, 108 Mass. 314. And in Indiana. *Coon* v. *Coon*, 26 Ind. 189. And in Kentucky. *Gaines* v. *Gaines*, 9 B. Mon. 303. We call attention to this fact because respondent seeks to sustain the action of the trial court by citations from states where this different rule obtains. In the absence of statute, the rule is inexorable that no alimony can be allowed where a divorce is granted for the fault of the wife. *Palmer* v. *Palmer*, 1 Paige, 276; *Waring* v. *Waring*, 100 N. Y. 570, 3 N. E. Rep. 289; *Everett* v. *Everett*, 52 Cal. 383; *McIntire* v. *McIntire*, 80 Mo. 470; *Harris* v. *Harris*, 31 Grat. 13. That the dictates of mercy and Christian charity might sometimes require an exception to this stern rule of the common law is no doubt true. Its rigid enforcement might sometimes cast a woman, weak rather than wicked, penniless and unprotected upon the charities of the world. This consideration it was that brought into existence the statute of which we have spoken. It has gone further. It has called forth protests from chancellors. *Perry* v. *Perry*, 2 Barb. Ch. 311; *Prichard* v. *Prichard*, 3 Swab. & T. 523. In this latter case the English chancellor adopted the somewhat questionable course of arbitrarily refusing a divorce until the husband voluntarily made provision for the wife, saying that, "if there were no precedent, he would establish one." But these protests only serve to demonstrate the inflexibility of the rule. And even in those states where the

common-law rule has been changed the courts are exceedingly cautious in giving the wife alimony in cases where she is the guilty party. This is well illustrated by the case of *Spitler* v. *Spitler*, supra. There the divorce had been granted to the husband, and the wife had been allowed alimony. The Supreme Court of Illinois reversed as to the alimony, and said: "It was manifestly not the object of the legislature in adopting the provisions of the statute above cited to abrogate the general priciples or policy of the law relating to the subject of alimony, but rather to clothe the courts with power to mitigate occasional hardships that would otherwise occur on account of the inflexible rule that the wife is not entitled to alimony where the divorce is granted to the husband on account of her own misconduct." And again: "To the suggestion, appellee for many years faithfully discharged her duties as a wife, and thereby materially aided appellant in accumulating his present property, and should therefore have a part allowed to her, it is a sufficient answer, under the circumstances of this case, to say that by the law as it existed at the time of their marriage, and as it continued to be many years thereafter, her time, services, and accumulations after such marriage became absolutely his. As a compensation for this, the same law compelled him to furnish her with a home, and provide for all her reasonable wants, according to his means and station in life; and, if he neglected to do this, others were authorized to supply such wants, and compel him to pay the bills. * * * So far as this record shows, the appellant faithfully discharged the obligations he assumed, and, if she is not now enjoying all the law secured to her, it is her own fault and folly, not her husband's; and she must submit to the consequences thus voluntarily brought upon herself, however grievous they may be."

A court of equity has no more worthy duty to perform than to force a derelict husband and father to support his wife and children. That burden both the common and statute law place upon him, and it is in the interests of a sound public policy, in the interests of morality, in the interests of the preservation of the family relation, which is the basis of all good government, that he should not be permitted to evade or disregard this burden. It is a sacred duty that is cast upon him, and in a proper case the Court should exercise all the powers permitted to it to enforce such duty. Nor can the husband, once the burden has been assumed, by any act of his own disencumber himself. At the same time, if he be faithless to his marital duties and obligations, the law will not compel the injured wife to live with him. She may rid herself of the incubus of his companionship, and yet retain the right to support, and this because he is the party who has broken the marriage contract. On the other hand, if the wife be guilty of that conduct which the law says forfeits her rights and privileges as a wife, when, in a proper case, this judgment of the law is pronounced by the court, she loses all her rights as a wife, including her right to support. The law lifts that burden from the husband. No responsibility in that di-

rection longer rests upon him, unless he voluntarily assume it. But this misconduct of the wife in no manner affects the husband's duty to support the minor children, the issue of such marriage; and undoubtedly a court may, even when the wife is in fault, give her the custody of the children, particularly if they be of tender years, and in such a case the court may direct that the father pay to the mother a sum certain for the support of such children. Such were the facts in the case of *Pollock* v. *Pollock* (S. D.) 68 N. W. Rep. 176, so much relied upon by counsel. The case has no priciple in common with the case at bar.

Since, then, neither at common law nor under our statute was the respondent entitled, as a matter of law, to any support from the appellant, we are not to presume that the Court made the allowance by virtue of his power, under the law and the facts, to grant a divorce, if the record presents any other sufficient reason for that provision in the decree. When we turn to the order for the decree, we find that the Court studiously avoided placing the provision upon any legal right in respondent. The action was based upon the misconduct of the wife, which was set forth in detail in the complaint, confessedly sufficient to bring it within the statute. This misconduct the wife denied. But the Court recites that all the allegations of the complaint were sustained by the evidence, thus forever foreclosing respondent's right to any allowance under the facts. The Court immediately adds, in effect, that inasmuch as plaintiff had by stipulation in writing agreed to pay to defendant the sum of $30 per month, and had agreed that such provision might be made in the decree it was so ordered. In other words, the effect of the order was to declare that the law had relieved the plaintiff of all duty to support the defendant, but he had agreed to pay her a certain sum and therefore the Court would decree such payment. But what was that more than an order on contract? The parties were thenceforth strangers, as absolutely as though they never had met. Every right and obligation under or by virtue of the marriage relation had been swept away. The right to the allowance rested on the naked contract. If it be claimed that the appellant was forced into this stipulation in order to obtain his divorce, then the agreement, being entirely unexecuted, and being in furtherance of the divorce, is void. *Speck* v. *Dausman,* 7 Mo. App. 165; Seeley's Appeal, 56 Conn. 202, 14 Atl. Rep. 291; *Jordon* v. *Westerman,* 62 Mich. 170, 28 N. W. 826. We are unable to see how that can aid respondent. It may be too late now for appellant to avoid the contract. But, be that as it may, if the contract be void it does not change respondent's legal rights. It does not entitle her to that to which the record shows she was not entitled in the absence of the contract. View it as we may, if she have any rights here, they must rest for their basis upon that contract. Embodying that contract in the decree could not change its essential nature.

It cannot be claimed that this appellant can be imprisoned for debt in this case. Section 15, State Const., limits such imprisonment to

cases where a party refuses to turn over his estate for the benefit of creditors as prescribed by law, or cases of tort, or where there is a strong presumption of fraud. This case does not come within the permission. Treating the proceeding purely as in civil contempt,—and such it no doubt is,—it must come under some one of the subdivisions of section 5934, Rev. Codes, authorizing punishment for civil contempts. Respondent claims that it comes within subdivision 8, which permits such punishment "in any * * * case * * * where an attachment or any other proceeding to punish for contempt has been usually adopted and practiced in a court of record to enforce a civil remedy or to protect a right of a party to an action or proceeding in such court." But this claim is made upon the theory that the Court is seeking to enforce alimony or the allowance specified in our statute, and which the Court has the power to make, which is analogous to alimony. But, while it is conceded that the payment of alimony has frequently been enforced by contempt proceedings, yet, as we have seen, this is not alimony, nor is it the allowance permitted by statute. Hence the imprisonment cannot be justified upon that ground. It is further claimed, however, that it comes within the third subdivision, which permits such punishment for the nonpayment by a party to an action of a sum of money ordered by the Court to be paid, where by law execution cannot be awarded for the collection of such sum. But why cannot execution be awarded to collect any sum adjudged to be due upon contract? Or, rather, by what other means known to the law are contract debts ever enforced? Does the provision mean that contempt proceedings may always be used where the wording of the judgment is too indefinite to support an execution? Respondent clearly has a right, under the stipulation, to a judgment upon which an execution would issue. If she have not such a judgment, it is not because the law forbids. Hence contempt proceedings are improper. But we by no means say that execution may not be issued on the judgment as it stands. We do not decide that point, but see *Lansing* v. *Lansing*, 4 Lans. 377; *Miller* v. *Miller*, 7 Hun, 208. Indeed, it may be correct, as counsel so ably argue, that in this state contempt proceedings may never be proper to enforce the payment of a money allowance as alimony. It is generally held, where contempt proceedings are used, that such proceedings are not exclusive, but that execution may be used to enforce the payment of money. *Barber* v. *Barber*, 21 How. 582; *Gray* v. *Cook*, 24 How. Prac. 432; *Becker* v. *Becker*, 15 Ill. App. 247; *Dinet* v. *Eigenmann*, 80 Ill. 274; *Downs* v. *Flanders*, 150 Mass. 92, 22 N. E. Rep. 585; *Foster* v. *Foster*, 130 Mass. 189; *Robinson* v. *Robinson*, 79 Cal. 511, 21 Pac. Rep. 1095; *Van Cleave* v. *Bucher*, 79 Cal. 600, 21 Pac. Rep. 954; *Allen* v. *Allen*, 72 Iowa, 502, 34 N. W. Rep. 303; *Taylor* v. *Gladwin*, 40 Mich. 232. But we do not express an opinion on the subject, as we have not a case of alimony before us. But we hold that no contempt proceedings were allowable in this case, and the order of the District Court is reversed. All concur.

(77 N. W. Rep. 594.)

ST. LUKE'S HOSPITAL ASSOCIATION *vs.* GRAND FORKS COUNTY.

Opinion filed December 8, 1898.

Supplies Furnished Pauper—Liability of County.

To entitle one to recover from a county for services or supplies furnished to a pauper to whom such county owes the duty of support and care under the statute, it must appear that the services rendered and relief given were in pursuance of an authorization proceeding from some one having authority to bind the county.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by St. Luke's Hospital Association against Grand Forks County. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

Affirmed.

J. A. Sorley, for appellant.

J. G. Hamilton, for respondent.

YOUNG, J. The District Court sustained a demurrer to the complaint in this action, interposed upon the ground that the complaint did not state facts sufficient to constitute a cause of action. The correctness of that order is challenged in this appeal. The plaintiff, a corporation, conducting a hospital at Grand Forks, sued the defendant county to recover for care, nursing, board, and lodging furnished by it in 1897 in its hospital, to an alleged pauper. It is needless to set out the particular allegations of the complaint. For the purpose of this decision, it may be conceded that the complaint shows that the support was given as alleged, and to one to whom, under the statutes, the defendant county owed the duty of extending relief. It does not state, however, that such relief was extended at the instance or request of any one having authority to bind the county. On the other hand, it shows affirmatively that authorization was refused on behalf of the county. Under these facts, the complaint fails to set out a legal liability.. Counties owe no other duties to the poor, and incur no other liabilities for their support, than those imposed by statute. This was expressed in *Hamlin Co.* v. *Clark Co.*, 1 S. D. 131, 45 N. W. Rep. 329, in the following language: "The obligation or duty of a county to relieve and support the poor and indigent is purely statutory, and, to make a county liable, the case must fall within the liability created pursuant to and in the manner prescribed by the statute." In *Moon* v. *Board*, 97 Ind. 176, that Court said: "A claim against a county for services can exist only where there is a contract, or where there is a statute providing and directing compensation. No person can voluntarily perform service for a county, and demand compensation, except in cases provided by statute, and one who demands compensation for

services rendered to a county must show a contract made under due authority of law with the proper officers, or else show a statute making provision for such services. It must also be made to appear in cases where a contract is relied upon that the contract was within the scope of the authority of the officers or agents who assumed to make it." Numerous cases, similar to the one at bar, have arisen wherein persons have sought to recover for relief furnished either to paupers or those to whom the county owed the duty of giving relief. Uniformly, recovery has been denied. *Kellogg* v. *Inhabitants of St. George,* 28 Me. 255; *Proprietors of Twp. No. 6* v. *Jones,* 12 Mass. 334; *Miller* v. *Inhabitants of Somerset,* 14 Mass. 396; *Hamilton Co.* v. *Meyers* (Neb.) 37 N. W. Rep. 623; *Roberts* v. *Commissioners,* 10 Kan. 33; *Board* v. *Plaut,* 42 Ill. 324; *Gage Co.* v. *Fulton* (Neb.) 19 N. W. Rep. 781; *Hendricks* v. *Board* (Kan. Sup.) 11 Pac. Rep. 450; *Mansfield* v. *Sac Co.* (Iowa) 14 N. W. Rep. 73; *Bentley* v. *Board,* 25 Minn. 259; *Board* v. *Weeldon,* 15 Ind. 147. The state of Wisconsin seems to have departed from the weight of authority in *Mappes* v. *Iowa Co.* (Wis.) 1 N. W. Rep. 359, and *Davis* v. *Town of Scott* (Wis.) 18 N. W. Rep. 530; but that Court, in *McCaffrey* v. *Town of Shields* (Wis.) 12 N. W. Rep. 54, held that a county was not liable to one who without authorization furnished supplies to a pauper; and later, in *Beach* v. *Town of Neenah* (Wis.) 64 N. W. Rep. 319, Cassody, J., who wrote the opinion in *Davis* v. *Town of Scott,* supra, in permitting a recovery based upon an implied agreement with the supervisors arising from their knowledge of and consent to the rendition of the services to the pauper, by the party seeking to recover, cited the preceding Wisconsin cases as expressly upholding that view. Some states, notably Maine, have extended the method of giving relief to paupers, by expressly providing that, when public officials shall fail or neglect to do their duty, any person may, after giving due notice, render assistance, and the county shall be liable. The legislation of North Dakota does not go to that extent. Article 1, c. 22, Rev. Codes, provides the persons to whom, the officers by whom, and the manner in which, the county extends its bounty to the poor. It does not include authority to those who are not therein charged with that duty, to determine who are paupers, and to furnish them succor at the expense of the county.

Other interesting points are discussed in the briefs of counsel, but that already disposed of is so fatal to the cause of action that their consideration would be without benefit. It being necessary, then, to render a county liable as a debtor for aid furnished to a pauper, either that there be a statute authorizing any person to give it at the expense of the county, or that it was extended pursuant to the request of some one having authority to act, it is plain that, in the absence of both, the complaint did not state a cause of action. The order sustaining the demurrer is affirmed. All concur.

(77 N. W. Rep. 598.)

WARNKEN & COMPANY *vs.* LANGDON MERCANTILE COMPANY.

Opinion filed December 28, 1898.

Conditional Sale—Property Removed from Foreign State—Title—Waiver.

Where personal property owned by a co-partnership in Manitoba, as vendor, under conditional sale notes reserving title in it, is brought into this jurisdiction by the vendee, without its authority or knowledge, its title to such property continues until defeated by a voluntary waiver thereof. In an action by the vendor to recover in conversion the value of such property, the defense of waiver of title is for the jury, where the evidence is not clear and convincing.

Appeal from District Court, Cavalier County; *Sauter, J.*

Action by T. J. Warnken and Bertha Warnken, co-partners as Warnken & Co., against Charles Chrisholm and Charles Hunter, co-partners as the Langdon Mercantile Company. Verdict for defendants. From an order refusing a new trial, plaintiffs appeal.

Reversed.

J. C. Monnet, for appellants.

W. J. Kneeshaw, for respondents.

YOUNG, J. Plaintiff, as alleged owner, seeks to recover from defendants in conversion the value of certain personal property, which it is conceded was taken and sold by it under a certain chattel mortgage, but, as it claims, lawfully. At the close of plaintiffs' case, upon defendant's motion, a verdict was directed in its favor. Motion for a new trial was made, and overruled. Plaintiff appeals. The evidence shows that on December 15, 1894, the plaintiff, which does business at Morden, in the province of Manitoba, made a conditional sale of certain personal property, the value of which is involved in this action, to one Andrew Albers, then a resident of Manitoba, the purchaser giving the plaintiff his four notes therefor, each of which contained this recital: "The title, ownership, and right of possession of the property for which this note is given shall remain in B. Warnken & Co. until this note, or any renewal thereof, is fully paid, with interest." Shortly afterwards Albers, without the knowledge or consent of plaintiff, brought this property into this state, and on March 16, 1895, mortgaged it to the Citizens' State Bank of Langdon, to secure a joint note given by himself and one Zado to the bank for a loan. Without commenting upon the weight of certain evidence which plaintiff contends shows that this note was in fact paid, for the purposes of this opinion it is sufficient to state that, by a series of transfers, it came into the hands of the defendant, who, in December, 1895, took the property, under the mortgage securing it, and sold it at foreclosure sale. It developed during the trial that the plaintiff had sent the Manitoba title notes to the Citizens' Bank of Langdon for collection, and that the cashier thereof had, on July 24, 1895,

taken two new notes, due in one and two years, as collateral to the title notes, and secured such new notes by taking a chattel mortgage upon this same property. The extent of the authority given to the bank by plaintiff is not clear. Neither does it clearly appear that the plaintiff was aware that this mortgage had been taken, until it was developed at the trial. It was shown that the cashier refused to surrender the title notes to the maker. When plaintiff rested its case, defendant moved for a directed verdict, upon the ground that plaintiff had failed to show ownership of the property, and that the chattel mortgage subsequently taken amounted to a waiver of the reservation of title in the original Manitoba notes, and rendered the sale absolute to Albers. Verdict was directed as requested. This is specified as error, and we think it was. It is not disputed that the legal effect of the original conditional sale notes executed in Manitoba was to effectually reserve the title and ownership of the property in the plaintiff, as well as to give it the right to reclaim possession, even as against an innocent purchaser for value. Such was the construction given to this class of notes in *Sutherland* v. *Mannix,* 8 Man. Rep. 541. It is clear that plaintiff still held the title of the property at the time of the trial, unless the legal effect of the Manitoba title notes has been in some manner modified. Counsel for respondent contends that the chattel mortgage executed by Albers on July 24, 1895, at the request of the cashier of the bank, as security for the debt, amounted to a waiver of title, and rendered the sale to Albers absolute. That such a waiver may be made is well settled. It is also true that a court will determine the legal effect of transactions evidenced by contemporaneous written instruments, and conclude therefrom whether the transaction so evidenced is a conditional sale with title reserved or sale absolute. Such was *Milling Co.* v. *Lowry* (Mont.) 12 Pac. Rep. 652, and *C. Aultman & Co.* v. *Silha* (Wis.) 55 N. W. Rep. 711. And will also give effect to the unequivocal acts of the vendor, such as soliciting, obtaining, and foreclosing a chattel mortgage upon property to which it, as vendor, apparently held title by reservation under a conditional sale. Such was *Machine Co.* v. *Lewis* (Kan. Sup.) 35 Pac. Rep. 12: "It is true that it is entirely at the option of the vendor whether he will waive the condition or not. It requires his voluntary act." *Upton* v. *Cotton Mills,* 111 Mass. 446. In *Kenney* v. *Ingalls,* 126 Mass. 488, the Court said: "The defendants, however, requested the judge to rule, and now contend as matter of law, that the condition had been waived by the plaintiff, and the sale had become absolute. Whether there had been a waiver is to be determined by the jury upon the facts proved. There may be such a state of facts that the Court would be called upon to instruct the jury, as matter of law, that there had been a waiver. Ordinarily, however, the question of waiver involves so much the intention and purpose of a party, which are to be inferred from the facts proved, that it is necessary to submit the question to a jury." Construing the evidence most favorably to plaintiff, against

whom the verdict was directed (*Pirie* v. *Gillitt,* 2 N. D. 255, 50 N. W. Rep. 710), we are far from satisfied that the evidence shows conclusively that plaintiff has voluntarily done any act amounting to a waiver of title. The question of waiver in this case was one for the jury, under proper instructions. It does not appear that plaintiff attempted to enforce the mortgage, or relied upon it in any way, and the evidence indicates that it did not know it had been taken. The Court erred, therefore, in assuming as matter of law, that there had been a waiver, and in directing a verdict for defendant. *Vickery* v. *Burton,* 6 N. D. 245, 69 N. W. Rep. 193; *McRea* v. *Bank,* 6 N. D. 353, 70 N. W. Rep. 813. The order overruling the motion for new trial is reversed, judgment vacated, and new trial ordered. All concur.

(77 N. W. Rep. 1000.)

ARTHUR F. TURNER *vs.* H. H. ST. JOHN, *et al.*

Opinion filed December 28, 1898.

Foreclosure of Mechanics' Lien—Trial De Novo.

Evidence relating to certain disputed payments considered, and amount due plaintiff determined, upon a trial de novo in this Court in a mechanic's lien foreclosure case.

Note Not Given as Payment.

A certain note transaction considered and construed. *Held* to constitute neither payment to, nor the giving of collateral security to, the lien claimant.

Account Upon Which Lien is Based Sufficient.

An account filed to perpetuate a mechanic's lien, under section 5476, Comp Laws, which shows upon its face, the separate charges for three separate contracts, also separate charges for extras and alterations, preceded by a statement of what each is for, followed by a total credit for cash paid and statement of balance due, is sufficiently explicit to comply with the above section.

Mistake in Amount of Account Will Not Defeat Lien.

Where it appears that the account filed was for an amount more than was due, but it also appears that it was so filed as a result of an honest mistake of fact and in an honest belief in its correctness, the lien is not lost.

Mechanics' Lien for Construction of Passenger Elevator.

An account filed under section 5476, Comp. Laws, to secure a mechanic's lien for a balance due for the erection of a passenger elevator at a fixed total price, which shows such contract price, with a full description of the elevator built, with a statement of the balance due after allowing all credits, is sufficient.

Jurat to Affidavit Supplied by Proof Aliunde.

An account in writing, and properly sworn to and filed, under section 5476, Comp. Laws, is not rendered a nullity by reason of the

omission of the jurat, and the fact that the affidavit was properly made by the affiant may be shown by evidence aliunde.

Jurat Not Necessary to Validity of Affidavit for Lien.

The affidavit required by section 5476, Comp. Laws, construed. *Held* not to require the jurat to give it validity, and distinguished from affidavits primarily intended for evidence or as the basis of creating a right or duty in a public officer to act.

Priority of Mechanics' Lien Over Mortgage.

A mechanic's lien for the erection of a passenger elevator is superior to the liens of mortgages on the same property taken during the progress of the construction of the building. Haxton Heater Co. v. Gordon, 50 N. W. Rep. 708, 2 N. D. 246, followed.

Priority of Conflicting Interests Adjusted.

Priority of conflicting interests in the same property determined, and foreclosure decreed in accordance with such determination.

Appeal from District Court, Grand Forks County; *Fisk, J.*

Action by Arthur F. Turner against H. H. St. John, The Security Trust Company, Lester F. Thurber, as assignee of the Security Trust Company, The Guaranty Savings Bank of Manchester, New Hampshire, the Grand Forks Investment Company, the J. W. Reedy Elevator Manufacturing Company, and others, defendants, for the foreclosure of a mechanic's lien upon the "St. John Block" in the City of Grand Forks, N. D. Plaintiff had judgment establishing his lien for the sum of $7,858.25 and interest from January 3, 1892, as a first lien, and directing a sale of the property to satisfy the sum so found due. Plaintiff's claim to the amount of two thousand dollars was disallowed and not included in said judgment. Plaintiff, Arthur F. Turner, appealed from that portion of the judgment disallowing two thousand dollars of his account. The defendants, Lester F. Thurber, assignee of the Security Trust Company, The Guaranty Savings Bank of Manchester, New Hampshire, and the Grand Forks Investment Company, severally perfected appeals from the judgment in favor of plaintiff. The J. W. Reedy Elevator Manufacturing Company appealed from the judgment, declaring its account for lien insufficient and void. Case tried de novo upon the evidence taken below, and judgment ordered for the plaintiff establishing his claim for lien for full amount. The rights and priorities of all parties adjusted.

Templeton & Rex, for appellants, Lester F. Thurber, assignee of the Security Trust Company, The Grand Forks Investment Company, and the Guaranty Savings Bank of Manchester, N. H.

Appellants alleged payment in full. This was sufficient to justify the introduction of evidence showing that plaintiff owed office rent which he had agreed should be applied on the lien debt. *Fall* v. *Johnson,* 8 S. D. 163, 65 N. W. Rep. 909; *Bush* v. *Sproat,* 43 Ark. 416; *Farmers' Bank* v. *Sherman,* 33 N. Y. 69. The agreements of Clifford and the Grand Forks Investment Company to protect plaintiff against the notes given for moneys advanced,

amounted to collateral security and a waiver of any right to a mechanic's lien. § 5468 Comp. Laws; *Harrison* v. *Council Bluffs,* 25 Fed. Rep. 170; S. C. 33 Fed. Rep. 132; *Bissel* v. *Lewis,* 56 Ia. 231, 9 N. W. Rep. 177; *Hale* v. *Ry. Co.* 13 Fed. Rep. 204; *Croskey* v. *Carey,* 48 Ill. 442; *Kinzey* v. *Thomas,* 28 Ill. 502; *E. P. Allis Co.* v. *Madison,* 9 S. D. 459; S. C. 70 N. W. Rep. 650. Plaintiff's lien statement was insufficient in that it contained no itemized statement of account. *Red River Lumber Co.* v. *Congregation, etc.,* 7 N. D. 46, 73 N. W. Rep. 203; *Rude* v. *Mitchell,* 11 S. W. Rep. 225; *Valentine* v. *Ranson,* 10 N. W. Rep. 338. Plaintiff overstated the amount due him in his lien statement, this vitiates his lien. *Gibbs* v. *Hanchette,* 90 Mich. 657, 51 N. W. Rep. 691; *Stubbs* v. *Clarinda,* 22 N. W. Rep. 654; *Scheibner* v. *Cohen,* 65 N. W. Rep. 760; *Hannah & Lay Co.* v. *Mosser,* 105 Mich. 18, 62 N. W. Rep. 1120; *Nicolai Bros.* v. *Van Fridagh,* 31 Pac. Rep. 288; *Lynch* v. *Cronan,* 6 Gray 531; *Hoffman* v. *Walton,* 36 Mo. 613; *Kling* v. *Construction Co.,* 7 Mo. App. 410; *Foster* v. *Schneider,* 2 N. Y. Supp. 875; *Reeve* v. *Elmendorf,* 38 N. J. L. 125.

Burke Corbet, for appellant, the J. W. Reedy Elevator Manufacturing Company.

This appellant's lien existed and was in full force without any statement account or claim being filed with the clerk of the District Court. §§ 5469, 5476 Comp. Laws; §§ 4788, 4791, Rev. Codes; *Anderson* v. *Seamens,* 49 Ark. 475, 5 S. W. Rep. 799; *Berndt* v. *Armkneckt,* 50 Ill. App. 467; *Nielson* v. *Iowa Eastern R. Co.,* 51 Ia. 184, 1 N. W. Rep. 434; *Doolittle* v. *Plenz,* 16 Neb. 153, 20 N. W. Rep. 116; *Hoskens* v. *Carter,* 24 N. W. Rep. 249; *Curtes* v. *Broadwell,* 24 N. W. Rep. 265; *Noell* v. *Temple,* 12 Ia. 276; *Kidd* v. *Wilson,* 23 Ia. 464; *Evans* v. *Tripp,* 35 Ia. 371; *Hill* v. *Building Co.,* 6 S. D. 160, 60 N. W. Rep. 752; *Wisconsin Trust Co.* v. *Robinson & Cary,* 68 Fed. Rep. 778; *Kohn* v. *Hager,* 30 Ark. 28; *Bissell* v. *Lewis,* 9 N. W. Rep. 177; *Chicago, etc.* v. *Des Moines,* 65 N. W. Rep. 1017; *Lumber Co.* v. *Bowman,* 42 N. W. Rep. 557; *Lee* v. *Hoyt,* 70 N. W. Rep. 95; *Hoppes* v. *Baie,* 75 N. W. Rep. 495; *Whittier* v. *Blakely,* 11 Pac. Rep. 305. Appellant's lien was good as against all defendants in this case because their rights accrued before the expiration of ninety days from the completion of the building or the elevator and subsequent to the commencement of the building. § 5478 Comp. Laws; § 4793 Rev. Codes; *Haxton Steam Heater Co.* v. *Gordon,* 2 N. D. 246, 50 N. W. Rep. 708. Under the statute of this state and of Iowa, from which it was taken, a failure to file the lien statement does not defeat the lien except as to purchasers and incumbrancers. *Noel* v. *Temple,* 12 Ia. 276; *Kidd* v. *Wilson,* 23 Ia. 464; *Neilson* v. *Ry. Co.,* 51 Ia. 184, 1 N. W. Rep. 434; *Bissell* v. *Lewis,* 9 N. W. Rep. 177; *Evans* v. *Tripp,* 35 Ia. 371. As between the parties to the contract the filing of a statement for a lien not being necessary to create a lien. *Peatman* v. *Power Co.,* 64 N. W. Rep. 689; *Lee* v. *Hoyt,* 70 N. W. Rep. 95; *Chicago L. Co.* v. *Des Moines,*

65 N. W. Rep. 1017. Therefore the filing of an erroneous statement will not necessarily defeat the right of the contractor to a lien. *Ewing* v. *Stockwell,* 75 N. W. Rep. 657; *Hill* v. *Building Co.,* 6 S. D. 160, 60 N. W. Rep. 752; *Parker* v. *Randolph,* 59 N. W. Rep. 722; *Wisconsin Trust Co.* v. *Robinson & Carey,* 68 Fed. Rep. 779; *Sarles* v. *Sharlow,* 5 Dak. 100, 37 N. W. Rep. 748. Appellant's account and claim for lien, while in some respects irregular, is not fatally defective. *Howe* v. *Smith,* 6 N. D. 432, 71 N. W. Rep. 552; *White Lake L. Co.* v. *Russell,* 3 Am. St. Rep. 262, 22 Neb. 126; *Laird Norton & Co.* v. *Hopkins,* 6 S. D. 217, 60 N. W. Rep. 857; *Evans* v. *Sanford,* 65 Minn. 271; *Drexel* v. *Richards,* 70 N. W. Rep. 23; *Cary* v. *McCarty,* 50 Pac. Rep. 745. The want of jurat upon this appellant's lien affidavit, when the claim was in fact sworn to, does not defeat its lien. The jurat may be amended. *Jackman* v. *City,* 143 Mass. 380, 9 N. E. Rep. 740; *Hitchings* v. *Ellis,* 1 Allen 175; *Hunter* v. *La Conte,* 6 Cow. 728; *People* v. *Rensselaer,* 6 Wend. 543; *McKinney* v. *Wilson,* 133 Mass. 131; *Bennett* v. *Paine,* 7 Watts, 334; *Laswell* v. *Presbyterian Church,* 46 Mo. 279; *Pottsvill* v. *Curry,* 32 Pa. St. 443; *Peterson* v. *Fowler,* 43 N. W. Rep. 10; *Fortenheim* v. *Clafin,* 47 Ark. 49, 14 S. W. Rep. 462; *Wiley* v. *Bennett,* 9 Baxt. 581; *Stout* v. *Folger,* 34 Ia. 71; *Kruse* v. *Wilson,* 79 Ill. 233; *Bergsch* v. *Keevil,* 19 Mo. 127; *Ainslee* v. *Kohn,* 16 Ore. 363, 19 Pac. Rep. 97; *Cook* v. *Jenkins,* 30 Ia. 432; *Heffernon* v. *Harvey,* 24 S. E. Rep. 592; *Fidelity Ins. Co.* v. *Roanoke Iron Co.,* 81 Fed. Rep. 440; *Bickerdike* v. *Allen,* 157 Ill. 95, 41 N. E. Rep. 740; *Cox* v. *Stern,* 48 N. E. Rep. 906; *Williams* v. *Stevenson,* 103 Ind. 243, 2 N. E. Rep. 728. The omission of a jurat and irregularities therein are cured by a recital in the body of the instrument to the effect, as in this case, that the affiant was sworn. *Jackman* v. *Gloucester,* 143 Mass. 380, 9 N. E. Rep. 740; *Bandy* v. *Ry. Co.,* 33 Minn. 380; *Pottsville* v. *Curry,* 32 Pa. St. 442; *Fortenheim* v. *Claflin,* 14 S. W. Rep. 462; *Beckerdike* v. *Allen,* 41 N. E. Rep. 740. This appellant upon the trial filed a new and corrected affidavit and account for lien. The lien may be filed after suit brought. *Whittier* v. *Blakely,* 13 Ore. 546, 11 Pac. Rep. 305. The provisions of the Revised Codes do not repeal the lien law under which this lien was filed. The provisions of the new are so nearly indentical with those of the old enactments in relation to mechanics' liens as to amount to a continuation thereof. *Gull River Lumber Co.* v. *Lee,* 7 N. D. 135, 73 N. W. Rep. 430; *Steamship Co.* v. *Joliffe,* 2 Wall. 450; *Wright* v. *Oakley,* 5 Metc. 406. An unconditional repeal of the former statute without any express reservation of rights existing or accrued thereunder would not justify a construction that such rights expired with the statute. *Christman* v. *Carleville,* 36 Mo. 610; *Winter* v. *Dickerson,* 42 Ala. 92; *Weaver* v. *Silk,* 10 Kan. 619; *Warren* v. *Woodward,* 70 N. C. 382; In re Hope Mining Co., 1 Sawyer, 710; Fed. Cases No. 6681 *Strembel* v. *Ry. Co.,* 12 Wis. 67; *Hallahan* v. *Herbert,* 11 Abb. Pr. N. S.

326; *Chowning* v. *Barnett,* 130 Ark. 560; *Handel* v. *Elliott,* 60 Tex. 145; *State* v. *Moorehouse,* 5 N. D. 406, 67 N. W. Rep. 140.

Templeton & Rex, for the Guaranty Savings Bank, et al., in reply to brief of the J. W. Reedy Elevator Manufacturing Co.

The decision of the South Dakota Court, *Hill* v. *Alliance Building Co.,* 6 S. D. 160, 60 N. W. Rep. 752, is clearly unsound. The Court wholly overlooked or misconstrued portions of the statute. §§ 5469, 5476, 5477, 5478, 5481 and 5484, Comp. Laws. It is essential that the lien claimant make and file his statement in strict compliance with the statute, both as against persons with, and those without notice. *Brooks* v. *Burlington & S. Ry. Co.,* 101 U. S. 443. *Campbell* v. *Jacobson,* 145 Ill. 389, 34 N. E. Rep. 39; *Von Tobel* v. *Ostander,* 42 N. E. Rep. 152. The right to the lien bring purely statutory, the statute must be substantially complied with in all respects. *Osborn* v. *Co.,* 13 So. Rep. 776; *McGillivary* v. *District,* 65 N. W. Rep. 974; *Alfree Mfg. Co.* v. *Henry,* 71 N. W. Rep. 370; *Lavin* v. *Bradley,* 1 N. D. 291. Both the drawing and filing of the verified account are indispensable. *Fraine* v. *Hotel Co.,* 5 Pac. Rep. 725; *Gates* v. *Brown,* 25 Pac. Rep. 914; *Collier* v. *Batterton,* 29 S. W. Rep. 490; *U. S. Sav. L. & B. Co.* v. *Jones,* 37 Pac. Rep. 666; *Greeley, etc. Co.* v. *Harris,* 20 Pac. Rep. 764; *Stetson, etc. Co.* v. *Harris,* 32 Pac. Rep. 108. The necessity of a lien statement as against the owner and persons with notice has been recognized by this Court. *Howe* v. *Smith,* 6 N. D. 432; *Red River Lumber Co.* v. *Congregation,* 7 N. D. 46. In the jurisdictions where it is held that a failure to file the lien is not fatal, it will be found that the statute gives the lien upon the performance of the work or furnishing of material without any further action by the lien claimant. *Kirkwood* v. *Haxie,* 95 Mich. 62; *Lamont* v. *Lafevre,* 55 N. W. Rep. 687. A lien statement which does not appear on its face to be verified, where the statute requires it to be verified, is no lien statement at all and extrinsic evidence is not admissible to supply the omission. *Hill* v. *Alliance Bldg. Co.,* 60 N. W. Rep. 752, 6 S. D. 160; *Bank* v. *Hinchliffe,* 4 Ark. 445; *Ladow* v. *Groom,* 1 Denio. 429; *Ennor* v. *Thompson,* 46 Ill. 220; *Cantwell* v. *State,* 27 Ind. 505; *Harty* v. *Ladd,* 3 Ore. 353; *McDermaid* v. *Russell,* 41 Ill. 489; *Hallagan* v. *Herbert,* 2 Daly 253; *Conklin* v. *Wood,* 3 E. D. Smith 663; *Gates* v. *Brown,* 25 Pac. Rep. 914; *Mill Co.* v. *McDonald,* 5 Wash. 496, 32 Pac. Rep. 108; *Colman* v. *Goodnow,* 36 Minn. 9, 29 N. W. Rep. 338; *McGillivary* v. *District,* 65 N. W. Rep. 974; *Orr* v. *Russell,* 48 N. E. Rep. 444; *Lindsay* v. *Huth,* 74 Mich. 712; *Byrd* v. *Cochran,* 58 N. W. Rep. 127; *Finane* v. *Hotel Imp. Co.,* 5 Pac. Rep. 725; *Minor* v. *Marshall,* 27 Pac. Rep. 481; Phillips Mec. Liens (2nd.) § 366. Claiming an amount in excess of what is due vitiates the lien, particularly where the excessive claim is due to a failure to credit payments made. *Gibbs* v. *Hanchette,* 51 N. W. Rep. 691; *Hannah* v. *Mosser,* 62 N. W. Rep. 1120; *Nicolai Bros.* v. *Van Fridagh,* 31 Pac. Rep. 288; *Lynch* v. *Cronin,* 6

Gray 531; *Kling* v. *Ry Co.*, 7 Mo. App. 410. The Reedy Company did not file a "just and true account" of the demand due them and a failure to comply with the statute in this particular is fatal to the lien. *Rude* v. *Mitchell*, 11 S. W. Rep. 225; *Mitchell P. M. Co.* v. *Allison*, 71 Mo. App. 251. The repeal of the former mechanics lien law by the Revised Codes, pages 1517, 1518 and before the Reedy claim for lien was perfected, deprived it of no vested right, but destroyed the remedy by lien. *Dunwell* v. *Bidwell*, 8 Minn. 34; *Hanes* v. *Wadey*, 73 Mich. 178, 41 N. W. Rep. 222. The right to a particular remedy is not a vested right. Cooley Const. Lim. (5th Ed.) 443; *Woodbury* v. *Grimes*, 1 Colo. 100; *Templeton* v. *Horne*, 82 Ill. 491; *Watson* v. *Ry. Co.*, 47 N. Y. 157; *Frost* v. *Ilsley*, 54 Me. 345; *Hall* v. *Bunte*, 20 Ind. 304; *Smith* v. *Bryan*, 34 Ill. 364.

Cochrane & Corliss, for plaintiff and respondent.

It being conceded that plaintiff, Turner, was entitled to $51,545.25 on account of the construction of the building, the burden rests upon the defendants of establishing all payments made to him which he does not concede. *Liesemer* v. *Burg*, 63 N. W. Rep. 999; *Wallace* v. *Axtell*, 39 Pac. Rep. 594; *Brown* v. *Morgan*, 56 Mo. App. 382; *Oil Mill Sup. Co.* v. *Wolf*, 28 S. W. Rep. 167, 30 S. W. Rep. 145; *Pierec* v. *Hower*, 42 N. E. Rep. 223; *Lent* v. *Ry. Co.*, 29 N. E. Rep. 988; *Sampson* v. *Fox*, 19 So. Rep. 896; *Smith* v. *Lewiston*, 34 Atl. Rep. 153; *Terryberry* v. *Wood*, 37 Atl. Rep. 246; *Grant* v. *Roberts*, 38 S. W. Rep. 650; *Bannister* v. *Wallace*, 37 S. W. Rep. 250; 18 A. & E. Enc. Law 201-253. When an innocent mistake is made in the statement of lien, the party claiming a larger sum than is due the lien is not affected thereby. Boisot on Mec. Liens, § 425; *Harmon* v. *Ry. Co.*, 22 Pac. 407, 23 Pac. Rep. 1024, 25 Pac. Rep. 124; *Gordon, etc. Co.* v. *San Francisco*, 23 Pac. Rep. 1025; *Pacific M. Ins. Co.* v. *Fisher*, 39 Pac. Rep. 758; *Bank* v. *Curtis*, 18 Conn. 342; *Hopkins* v. *Forrester*, 39 Conn. 351; *Marston* v. *Kenyon*, 44 Conn. 349; *Kiel* v. *Carl*, 51 Conn. 440; *Nichols* v. *Culver*, 51 Conn. 180; *McCormack* v. *Philips*, 4 Dak. 506, 34 N. W. Rep. 39; *Culver* v. *Schoth*, 39 N. E. Rep. 115; *Albrecht* v. *Lumber Co.*, 26 N. E. Rep. 157; *Green Bay L. Co.* v. *Miller*, 62 N. W. Rep. 742; *Parker* v. *Bell*, 7 Gray 429; *Whitford* v. *Newell*, 2 Allen 424; *Underwood* v. *Walcott*, 3 Allen, 464; *Hubbard* v. *Brown*, 8 Allen 590; *Whitney* v. *Joslin*, 108 Mass. 103; *McMonegal* v. *Wilson*, 61 N. W. Rep. 495; *Greenwood* v. *Harris*, 8 Mo. App. 603; *Schroeder* v. *Mueller*, 33 Mo. App. 28; *Gaskell* v. *Beard*, 11 N. Y. Supp. 399; *Goodrich* v. *Gillies*, 31 N. Y. Supp. 76; *Rowland* v. *Harmon*, 34 Pac. Rep. 357; *Chamberlain* v. *Hibbard*, 38 Pac. Rep. 437; *Risen* v. *Moon*, 22 S. E. Rep. 165; *Whittier* v. *Mill Co.*, 33 Pac. Rep. 393; *Proulx* v. *Mill Co.*, 33 Pac. Rep. 1067; *Peterman* v. *Brewing Co.*, 39 Pac. Rep. 452; *Bolster* v. *Stocks*, 43 Pac. Rep. 534; *Hayes* v. *Hammond*, 44 N. E. Rep. 422; Philips on Mec. Liens 355-356. The claim that the lien was not transcribed by the

clerk under the provisions of § 5477 is fully disposed of by this Court in *Red River L. Co.* v. *Congregation,* 7 N. D. 46, 73 N. W. Rep. 203. The statement of lien embodies a sufficient statement of the items making up the plaintiff's claim. *Hilliker* v. *Francisco,* 65 Mo. 598; *Busso* v. *Fette,* 55 Mo. App. 453; *Buchanan* v. *Cole,* 57 Mo. App. 11; *Losman* v. *Conlon,* 57 Mo. App. 25; *Spears* v. *Lawrence,* 38 Pac. Rep. 1049; *Hayes* v. *Hammond,* 44 N. E. Rep. 422; *Davis* v. *Hines,* 6 Ohio. St. 473; *Heston* v. *Martin,* 11 Cal. 41; *Leeds* v. *Linn,* 44 N. W. Rep. 309; *King* v. *Smith,* 44 N. W. Rep. 65; *Brunns* v. *Braim,* 35 Mo. App. 337; *Grace* v. *Nesbit,* 18 S. W. Rep. 1118; Phillips on Mec. Liens, § 352; Boisot Mec. Liens, § 411. There is authority for the proposition that where the claimant makes a contract to do the work for a certain price and in the course of the work extra work is done no itemized statement of the extras is necessary even under a statute requiring an itemized statement. *Hayes* v. *Hammond,* 44 N. E. Rep. 424; *Bruns* v. *Braim,* 35 Mo. App. 337. The statute does not require that payments on the account be itemized. All that is required is that the account shall state the true amount due after allowing all credits. Where the statute does not require an itemized account, the items of debit and credit need not be set forth. Phillips Mec. Liens, § 353; *Wood* v. *King,* 21 S. W. Rep. 471; *Heston* v. *Martin,* 11 Cal. 41; *Brennan* v. *Swasey,* 16 Cal. 140; *Selden* v. *Meeks,* 17 Cal. 128; *Jewell* v. *McKay,* 23 Pac. Rep. 139; *Nichols* v. *Culver,* 51 Conn. 177; *France* v. *Woolston,* 4 Houst. 561; *Simonds* v. *Buford,* 18 Ind. 176; *Neeley* v. *Searight,* 15 N. E. Rep. 598; *Recker* v. *Joy,* 72 Me. 106; *Patrick* v. *Smith,* 120 Mass. 510; *Atkins* v. *Little,* 17 Minn. 358; *Lenkey* v. *Wells,* 16 Nev. 271; *Whittier* v. *Blakely,* 11 Pac. Rep. 305; *Ainslee* v. *Kohn,* 19 Pac. Rep. 97; *Curtiss* v. *Sestanovich,* 37 Pac. Rep. 67.

YOUNG, J. This is an action to foreclose a mechanic's lien upon what is known as the "St. John Block," in the City of Grand Forks. It is conceded that the interests of all the parties joined as defendants herein, in the property in question, are subordinate to the rights of plaintiff under his lien, if he is entitled to one and any balance still remains due to him thereon. The defendant H. H. St. John, the original debtor, and against whose property the lien was filed, did not appear or answer in the District Court. The same is true of George B. Clifford, E. F. Powers and Fred S. Martin. The other four defendants, however, contested plaintiff's right to recover, and in their separate answers set out at length the nature of the interest which each has in this property. The trial Court found for the plaintiff, and fixed the balance due upon his lien at $7,858.25, with 7 per cent. interest from January 3, 1892, adjudged the same to be first lien, determined the relative interest therein of the contesting defendants, and entered the decree of foreclosure usual in such cases. Both the plaintiff and the four contesting defendants appeal. Plaintiff appeals, contending that the sum allowed to him by the trial court is too small by $2,000. To

correct this, he asks us to reverse one particular finding of the Court, wherein, without sufficient evidence to support it, as he contends, he was found to have received at a certain time the sum of $2,000, which amount was charged to him by the Court, and deducted from the amount of his recovery. The defendants the Guaranty Savings Bank of Manchester, N. H., the Security Trust Company, and the Grand Forks Investment Company, feeling aggrieved by the amount of the allowance made to the plaintiff by the Court, also appeal. The remaining defendant, the J. W. Reedy Elevator Manufacturing Company, which claims an interest in the property under an alleged mechanic's lien, which it admits is subject to plaintiff's, but which it claims is superior to the rights of the other defendants, appeals from the action of the Court in entirely rejecting its claim to an interest in the property. It will be observed that the entire controversy is between parties asserting conflicting interests in the same property, and is not between Turner, the creditor, and St. John, his debtor.

The case is here for trial anew, under chapter 5 of the Laws of 1897. The record discloses that the defendant H. H. St. John was the owner of, or at least had the record title to, certain corner lots in the City of Grand Forks, and, in addition, was reputed to be a man of some financial resources. On February 11, 1891, St. John orally contracted with plaintiff to erect for him, upon his lots, a five-story brick and stone bank and office building, at an agreed price of $42,839. This did not include the finishing of the fourth and fifth stories. At a later time, however, plaintiff contracted to finish these two stories at a fixed compensation for each, and, in addition, furnished certain extras and made certain alterations; bringing the total cost of the construction of the building, or at least the portion done by plaintiff, to $51,545.25 at its completion. All parties to this litigation agree that this sum was due Turner in the first instance. Actual work was begun March 4, 1891, and the building was completed January 3, 1892. On January 11, 1892, Turner filed a mechanic's lien for an alleged unpaid balance of $22,680.25. In his complaint in this action he sets out as still due him a balance of $12,184.25, with interest from January 3, 1892. As a defense against the lien, all of the defendants united in alleging that plaintiff has been paid in full, and, with the exception of the Reedy Elevator Manufacturing Company, they strenuously urge that defense upon this appeal. It developed that St. John was not a man of means. He did, however, become an extensive borrower. On June 1, 1891, he executed a first mortgage for $40,000 on this property to the Security Trust Company. This mortgage was sold and assigned to the Guaranty Savings Bank, and the notes secured by it are still unpaid. On the same day, to-wit, June 1, 1891, St. John also executed a deed of the property to George B. Clifford and George F. Shutt, which appears to have been given in trust or for security. Again, on November 27, 1891, St. John executed a second mortgage to the Security Trust Company for $10,000.

This that concern still owns, and the debt secured is unpaid. The Guaranty Savings Bank, and Security Trust Company seek, in their defenses, to protect their respective interests in the property acquired under the mortgages. On February 11, 1892, George B. Clifford, G. F. Shult, and H. H. St. John joined in deeding the property in question to the Grand Forks Investment Company, which corporation had just come into existence under the auspices of Mr. Clifford, for the purpose, as the evidence shows, of financing this and other buildings then under process of construction and similarly situated financially; that is, to provide a method of carrying them to completion. The title still continues in the investment company. It is evident that these loans, which were negotiated by St. John through Mr. Clifford, who was the secretary and general manager of the Security Trust Company, were made for purposes connected with the construction of this building. The record, however, is silent as to the amount of money realized from them. Neither does it appear what portion thereof was paid to St. John by the Security Trust Company. They concern us, in finding the amount due plaintiff, only so far as we can trace payments made therefrom to plaintiff, Turner, upon his account, or to his subcontractors with his assent or upon his order. It is one of the conceded facts in this case that up to July 15, 1891, all payments made upon the contract were made by St. John; further, that none were made by him personally after that date. Turner experienced difficulty in getting money from St. John. The funds which Clifford was disbursing from these loans were not reaching Turner with certainty. On the above date, Turner obtained this order: "Grand Forks, North Dakota, July 15th, 1891. Geo. B. Clifford, Secy.: Please pay to Art Turner the amts. due him on his contract, from time to time, out of balance to my credit, acct. loan made on the property. H. H. St. John." After giving this order, St. John disappears from the record, and returns again only to execute the $10,000 mortgage, and later to join in the deed to the investment company. The record also shows that all payments that were made after the date of this order, up to and including April 26, 1892, were made by the Security Trust Company. Further, that all payments made after the last-named date were made by or through the Grand Forks Investment Company, including a prior payment made on March 7, 1892. It also appears that such payments as were made on the contract by the Security Trust Company and Grand Forks Investment Company (barring the note transactions, to which we will subsequently refer) were all by means of their checks drawn upon the Grand Forks National Bank, of which Mr. Clifford was an officer. These checks were within defendants' reach, and a portion of them were produced at the trial. The Security Trust Company kept a ledger account with this building. This account was afterwards transcribed into the books of the investment company, and by it was carried forward. These accounts were also carried back to show the amounts paid by St. John upon the contract, and forward to show the bal-

ance due Turner. Turner's account of the entire tranaction was kept by himself in a small pass book, in which, from time to time, he jotted down items of payment or disbursement. This book was lost by Mr. Turner a year or two prior to the trial. Its absence, however, is not embarrassing; for from it he made two different written statements for the defendants, showing the amounts paid up to October 8, 1891. All subsequent payments are entirely within the knowledge of the defendants. He also prepared his lien statement from this book, and in addition the items, as he had them, were compared with the records of the two companies making disbursements, through its officers, and, subject to the correction of one item which he had omitted, was considered by all parties as correct. Defendants offered in evidence several checks showing payment to Turner on dates differing from those found in the statements rendered by him. These we consider as mere discrepancies in dates. The total of payments credited on both statements was the same. Further, all of the checks given in payment, which defendants could apparently have produced, were not offered in evidence, and defendants did not show a total payment greater than that shown by the plaintiff's written statements. The conclusion which we have reached as to the amount due differs from that found by the trial court in several particulars. We have concluded plaintiff did not get the $2,000 charged to him in finding 45a-2, which is as follows: "That therewas paid plaintiff, prior to the commencement of this action, on account of the moneys due him for the construction and erection of said building, the sum of $2,000, which payment was made by a note of the Grand Forks Investment Company to him, and which note was subsequently paid by said Grand Forks Investment Company." It appears from the evidence that the investment company, in furtherance of the purpose of its existence, namely, to finance this building to a completion, made several payments by check to Turner and to his subcontractors for him. Besides, to relieve the condition which resulted from its inability to pay the amounts due Turner, it issued several promissory notes to him and to his subcontractors, under an arrangement whereby the Grand Forks National Bank, with which Mr. Clifford was connected, was to and did cash the same for the payees, with their guaranty. It was also a part of the agreement with the investment company that the latter would take up the notes so issued, and these amounts were, when paid, to be credited upon the contract. It is conceded these notes so issued were taken up. Among them are two notes given to Turner,—one for $2,000, dated December 20, 1893, due in six months, having upon its back Turner's written guaranty of payment, and also, in lead pencil, the following words: "Hold this note for Turner's indorsement to new note;" another for $2,500, dated December 23, 1893, due in six months, also with Turner's guaranty. Both of these notes were produced at the trial by the investment company, and, by separate findings of the trial court, the amount repre-

sented by each was charged to plaintiff. It is urged by plaintiff that this $2,000 note so charged to him was executed by mistake, and does not represent money received by him. A most careful examination of all the evidence relating to this transaction convinces us that in this he is correct. Early in his testimony, when narrating entirely from memory, under skillful cross-examination, the various ways in which he had obtained money upon this contract, and detailing the intricacies of a very complicated account, he said: "I got a couple of notes, one for $2,500 and one for $2,000, and they were paid at the bank, and I got the money on them." Later, however, and upon more mature deliberation, he stated that the only notes he took from the Grand Forks Investment Company to the bank, and cashed, were two, one for $1,000 and one for $1,500; that the $2,500 note was the renewal of these two; that the $2,000 note was an erroneous attempt at a renewal of the same notes. His evidence, standing alone, is not satisfying, but it is as clear as could be expected from one of ordinary memory, in relating the details of an extensive transaction which occurred six years previous, and of which he has no written record. It also appears that no necessity exists for leaving this item in any doubt. Absolute evidence that Turner did cash the note was obtainable at the bank, if that was the fact. This was available to defendants, who had assumed the burden of proving payments upon plaintiff's claim. Our doubt as to this item, however, is set at rest by other evidence. Mr. Webster, called by defendants, stated that he was secretary of the Grand Forks Investment Company, and had been since its organization, in January, 1892. Upon cross-examination, this witness said: "Turner is charged on his account, on page 188, date May 21, 1891, note, $2,500. There is noting else on the ledger." Also, when being further examined as to these notes: "I would not swear positively as to the $2,000 note, but at the time the $2,500 note was—at the time the settlement was made with the receiver, the memorandum made at the time of the settlement shows another note for $2,000, which was in the Grand Forks National Bank, but I would not swear positively to the $2,000 note. It is the note, as I recollect it, that was charged to him as bills payable. All the payments I can swear to positively as having been made to Mr. Turner by the Grand Forks Investment Company on this account, since I took the secretaryship of that company, are the $2,000 and $2,500." The $2,000 payment to which the witness refers relates to a check given by the investment company on May 11, 1892, which has been properly charged to Turner elsewhere, and has no connection with the $2,000 note. Elsewhere this witness, detailing the various payments made by his company upon this building to Turner's subcontractors, said that it "has also paid Mr. Turner $2,000 cash, and gave him a note for $2,500, which it afterwards paid. I think both of these transactions were after the books came into my possession, after May. My recollection is, it was paid $2,000 in cash and a note for $2,500, which the investment com-

pany afterwards took up." Aside from the evidence of witnesses bearing directly upon this question, there is the strong evidence of conceded balances, showing that Turner did not cash this note, and that the trial court was wrong in charging it to him. It stands uncontradicted in the evidence that there was due Turner a balance of $1,284, in addition to the sum of $8,500 involved in a note transaction, to which reference will hereafter be made. Turner swore to it. Both Clifford and Webster assented to it, and the books of the investment company show it. This, if the plaintiff is not to be charged with the $8,500 note transaction,—and the trial court found he was not,—makes a total due plaintiff of $9,784, or $1,925.75 more than was found by the trial court. This difference evidently resulted from erroneously charging the $2,000 note to Turner. The slight discrepancy of $74.25 probably resulted from an adjustment of other matters which do not appear in evidence.

We will now consider what in the briefs of counsel is termed the "note transaction." During the time when the Security Trust Company was making payments upon the contract, and at a time when it was not able to do so, and the demands of Mr. Turner, as well as his subcontractors, for money, were extremely urgent, and their necessities great, Mr. Clifford proposed that they give their notes to the Security Tyrst Company, and he would negotiate them and get the cash for them. This was done, and their notes were given, aggregating in amount $8,500. All of these notes, or renewals thereof, are outstanding and unpaid. It seems, also, to be undisputed that, when the notes were given, Clifford assured the makers that he would take care of the notes by personally paying them, or by a sale of the stock of the Grand Forks Investment Company, which he then had in contemplation as a means of financing these unpaid balances, which stood as first liens upon property in which both he and his clients had heavy interests. There is evidence tending to show that subsequently stock in that company was issued and was held as collateral to these notes. Defendants contend that this $8,500 so realized should be credited upon the building. To this we cannot agree. These parties gave their individual notes and got the money. Those notes are outstanding and unpaid. Defendants seek to connect the loan transaction with Turner's contract. It is doubtless true that, if St. John had met his payments, these parties would not have given their notes to get necessary funds. And it is also probable that Clifford would not have negotiated the loans or made promises to take care of the notes had it not been imperative, in his view, in his own and his client's interest, to gain time to take care of the unpaid balance due Mr. Turner. It is plain to us that this tranaction, when devested of the complications incident to a mistaken business venture, amounts merely to an ordinary loan, made by the plaintiff and his subcontractors through the agency of Mr. Clifford, from the Security Trust Company, and upon the promise to pay contained in their notes. There is an item of $552.60 which we deem proper to charge to Turner. This the

trial court refused to do. This item grows out of an over-payment of that amount made to Mr. Deming, one of Turner's subcontractors, by the investment company. Our examination of the evidence satisfies us that Mr. Turner assented that this sum should be charged back to him, and, further, that he has had the benefit of it in the settlement of his accounts with Deming, and we so determine. It also appears that the plaintiff has occupied an office in this building along with Dinnie Bros., and has paid no rent pending the settlement of the balance due him. There is no sufficient basis in the evidence for a complete adjustment of this to date. We therefore shall deduct from his recovery only the sum of $180, being $7.50 per month for 24 months, the same amount paid by Dinnie Bros., as shown by the evidence. Recapitulating, we find the balance due plaintiff to be $2,000 in excess of the amount found by the trial court, less the Deming item of $552.60, and rent, $180, or, in exact figures, $9,125.65, with 7 per cent. interest since January 3, 1892.

These three defendants, whose appeals we have been considering, in addition to the defense of payment, also attack the validity of the lien itself. It is urged that if the $8,500 note transaction, before referred to, did not in fact amount to a payment upon the amount due Turner, neverthless Clifford's promise, and the issuance of the investment company stock, if such was the fact, constituted such a taking of collateral security as forfeited plaintiff's lien, under section 5468, Comp. Laws, then in force, which is as follows: "No person is entitled to a mechanic's lien who takes collateral security on the same contract." The facts in this case, as we find them, render this principle entirely inapplicable. If in fact we assume that security was given by Clifford of a valid and enforceable nature, and that the stock was issued and put up, it was merely to secure the payment of the notes given by Turner and others to the Security Trust Company, upon which they had, in our view, borrowed money, and for nothing else. There is an entire absence of evidence even tending to show that Turner ever received or held collateral security of any kind to secure the debt due him from St. John. Appellants also contend that the lien statement filed by plaintiff does not contain "a just and true account of the demand due him, after allowing all credits," as provided in section 5476 of the Compiled Laws, which were in force when the statement was filed. The account is first assailed as insufficient in substance. We think the account is sufficient. It shows upon its face that all items were furnished between February 11, 1891, and January 3, 1892. On the debit side, St. John is charged with the prices agreed upon for the three separate contracts, properly designating each, as the original contract, the one for the fourth, and the one for the fifth story. The remaining charges are made in 39 separate amounts, preceded by a clear statement of what each is for.

Under the total of the debits appears the credit for cash paid, followed by the balance found due after the deduction. An "account" under the statute referred to, is sufficient if it comes within the ordinary meaning of that term, or is one that is a fair and substantial compliance with the law. In the language of *Gwin* v. *Waggoner* (Mo. Sup.) 11 S. W. Rep. 227, relied upon by appellants, a just and true account, even when required to be itemized, means "a fairly-itemized account, showing what the materials are, and the work that was done, and the price charged, so that it can be seen from the face of the account that the law gives a lien therefor. See Phil. Mec. Liens (2d Ed.) § 353, and cases cited.

The chief and more serious objections made to the account filed is that it is not true, in not correctly stating the credits, and in claiming an amount largely in excess of the amount actually due. The evidence shows that at the date the lien statement was sworn to, to-wit, January 10, 1892, the following payments had been made, either to the plaintiff or to his subcontractors for his benefit, none of which payments were credited upon the account: $2,000 paid directly to Turner by a check of St. John's dated May 23, 1891; $2,100 paid to the Minneapolis Wire Works Company by the Security Trust Company by check dated December 10, 1891; $500 paid to C. B. Deming by the Security Trust Company by check dated December 21, 1891,—all three checks being drawn upon the Grand Forks National Bank. The failure to credit the last two payments was so clearly excusable and innocent that we merely refer to the facts: First, they were not made to Turner himself, but to his creditors, and only a very short time before the lien was sworn to, and it is not clear that such payments had actually come to his knowledge; second, the account attached to the lien, although sworn to on January 10, 1892, bears date of December 10, 1891, and only purports to give the state of the account to that date, which was in fact prior to both of these payments. The only question, then, is as to the $2,000 payment made by St. John. This item was not credited in either of the two written accounts presented to the defendants. The evidence shows that plaintiff had no record of it when his account was being compared, by him and the officers of the Security Trust Company, with their books, subsequent to the filing of the lien. It developed then that an entry appeared on their books showing this payment by St. John. Upon the discovery of this entry, Mr. Turner and a representative of the trust company made an investigation to ascertain the correctness of the charge, and, after a search through the canceled checks of St. John in the Grand Forks National Bank, found St. John's check for the $2,000. Turner promptly corrected the error, and at no time since has the payment been questioned by him. It seems that his brother had obtained the money on the check, and then deposited it in the bank, but failed to give St. John credit for it upon the account. Does the fact that the amount claimed in the lien was excessive, in the amount and under the circumstances above stated, defeat the

lien? We think not. The Supreme Court of Michigan in *Gibbs* v. *Hanchette,* 51 N. W. Rep. 691, a case cited by appellants, states the principle applicable in the following language, which meets with our approval: "The purpose of the statute is that an accurate and truthful claim shall be filed. The authorities very generally hold that where there is an honest mistake of fact, made in the honest belief of its correctness, courts will not for that reason hold that the lien is lost. But, where claimants place upon record a statement which they know is not correct, the authorities are very uniform that the lien is lost." In our judgment, the mistake in the credits was both honest and excusable, and does not defeat plaintiff's lien. The fact of the failure of the clerk to abstract the lien statement need not be determined. The defendants are not innocent purchasers or incumbrancers, and are not in a position to gain added rights by reason of that omission, as foreshadowed, but not decided, in *Lumber Co.* v. *Friel,* 7 N. D. 46, 73 N. W. Rep. 203.

We will now consider the appeal of the Reedy Elevator Manufacturing Company. On August 28, 1891, this appellant made a written contract with St. John to erect a passenger elevator in this building, at an agreed price of $2,850. It was built according to contract, and turned over, completed, on December 30, 1891. On March 28, 1892, appellant filed with the clerk of the District Court of Grand Forks county an account claiming a lien for the balance of the contract price, which was then and is still unpaid. Appellant's claim was entirely denied by the trial court upon objections made by the Guaranty Savings Bank and Security Trust Company, directed to the sufficiency of the account filed, both in substance and in form. The account was filed under section 5476, Comp. Laws, then in force, which reads as follows: "Every person, except as has been provided for subcontractors, who wishes to avail himself of the provisions of this chapter, may file with the clerk of the District Court of the county or judicial subdivision in which the building, erection or other improvement to be charged with the lien is situated, and within ninety days after all the things aforesaid shall have been furnished or the labor done, a just and true account of the demand due him after allowing all credits, and containing a correct description of the property to be charged with said lien, and verified by affidavit; but a failure to file the same within the time aforesaid shall not defeat the lien, except as against purchasers, or incumbrancers in good faith, without notice, whose rights accrued after the ninety days and before any claim for the lien was filed." The account is in form an affidavit purporting to have been made for appellant by its vice president. After the venue, it begins with this recital: "William J. Reedy, being duly sworn, says." At the close appears the signature, "William J. Reedy," and underneath his name the words, "Subscribed and sworn to before me this 28th day of———, 18—." Instead of a jurat, there

is attached, on a separate slip of paper, pasted over the words last quoted, a regular form of acknowledgment.

The first objection is that the account filed "does not contain any account of any work done or material furnished or credits given, * * * and does not contain an account of the amount claimed to be due the pretended lienholder." This objection is not tenable. The phraseology of the account may be subject to criticism, but its meaning is clear. It shows upon its face the contract price, and, in detail, a complete description of the elevator constructed, and includes the statement that there is due the sum of $2,690, after allowing all credits.

The second objection is "upon the ground that the pretended lien is not sworn to as required by law, and is not verified as provided and required by law." If, in fact, the account filed was not "verified by affidavit," as required by the statute above quoted, it is a nullity, and the omission is incurably fatal to the enforcement of any rights which depend upon it. Oral evidence was offered to show that the affidavit was sworn to. This the trial court refused to consider. In accordance with the statute under which the case was tried, however, this evidence was received, and, together with the rejected account, is in the record before us. Does the failure of the notary public to attach the jurat render the affidavit a nullity? Our construction of the statute, based upon the overwhelming weight of judicial interpretation, while contrary to usage, compels us to give a negative answer. In the absence of a legislative mandate requiring the jurat, or some provision of law making it an essential part of the affidavit or oath, an account in writing, duly sworn to before a proper officer, and filed under the section above quoted, is not fatally defective on account of the absence of the jurat, and the fact that it was sworn to may be proved by extrinsic evidence. The statement of account which the lien claimant files must be "verified by affidavit." In the absence of a statute affixing a different meaning, "an affidavit is simply a written declaration on oath, in writing, sworn to by the declarant, before a person who has authority to administer oaths." And. Law Dict.; 1 Bouv. Law Dict. 79; *Harris* v. *Lester,* 80 Ill. 307; *Hitsman* v. *Garrard,* 16 N. J. Law, 124; *Cox* v. *Stern,* 170 Ill. 442, 48 N. E. Rep. 906; 1 Enc. Pl. & Prac. 309. See also, Comp. Laws, § 5278. "The jurat or certificate is no part of the oath or affidavit, but simply evidence that the oath was made or the affidavit was sworn to." *Bantley* v. *Finney* (Neb.) 62 N. W. Rep. 213; *Williams* v. *Stevenson,* 103 Ind. 243, 2 N. E. Rep. 728. It is also held that "it is not necessary to its completeness that the party making should sign it, unless the statute expressly requires such signatures." *Bates* v. *Robinson,* 8 Iowa 318; *Hargadine* v. *Van Horn,* 72 Mo. 370; *Norton* v. *Hauge* (Minn.) 50 N. W. Rep. 368. *Cox* v. *Stern,* supra, involved the sufficiency of an affidavit extending a chattel mortgage lien. Like this case, the affidavit was signed, and acknowledgment attached instead of a jurat. The opinion tersely states the doctrine, upheld

by the decided weight of authority, in this language: "We are of the opinion that the jurat or certificate of the officer administering the oath is not a necessary part of the affidavit, but that it may be shown aliunde that the statements contained in the instrument were, in truth and in fact, made as they purported to be,—on oath duly administered by an officer duly authorized. The statute prescribes no form for the affidavit, and makes no provision as to the form in which the evidence of the oath shall be preserved or made to appear, but only requires that an affidavit shall be filed, etc. Of course, common prudence would dictate that a properly executed jurat, or certificate of the officer showing the oath, should be attached; but, when attached, it is not conclusive, but may be shown to be false; and if shown to be false, and that no oath was in fact administered, the instrument would not be an affidavit. We are of the opinion that the record was sufficient to give notice to third persons that the alleged affidavit was made on oath, and that parol evidence was admissible on the trial to prove that the oath was actually taken." *Cox* v. *Stern*, 170 Ill. 442, 48 N. E. Rep. 906.

Our views find support in the following cases: *Hitsman* v. *Garrard*, supra; *Ladow* v. *Groom*, 1 Denio, 429; *Lawton* v. *Kiel*, 51 Barb. 30; *Bergesch* v. *Keevil*, 19 Mo. 127; *Finley* v. *West*, 51 Mo. App. 569; *Bennet* v. *Paine*, 7 Watts, 334; *Borough of Pottsville* v. *Curry*, 32 Pa. St. 443; *Angier* v. *Schieffelin*, 72 Pa. St. 106; *Jackman* v. *Gloucester*, 143 Mass. 380; 9 N. E. Rep. 740; *Williams* v. *Stevenson*, 103 Ind. 243, 2 N. E. Rep. 728; *Grocery Co.* v. *Draham*, 8 Wash. 263, 36 Pac. Rep. 31; *Fortenheim* v. *Chaflin*, 47 Ark. 49, 14 S. W. Rep. 462; *Bloomingdale* v. *Chittenden*, 75 Mich. 305, 42 N. W. Rep. 836; *Peterson* v. *Fowler*, 76 Mich 258, 43 N. W. Rep. 10; *Kruse* v. *Wilson*, 79 Ill. 233; *Harris* v. *Lester*, 80 Ill. 307; *Bickerdike* v. *Allen*, 157 Ill. 95, 41 N. E. Rep. 740; *Cook* v. *Jenkins*, 30 Iowa, 452; *Stout* v. *Folger*, 34 Iowa, 71; *Stock Co.* v. *Weber*, 41 Ohio St. 689; *Fidelity Insurance, Trust & Safe-Deposit Co.* v. *Roanoke Iron Co.*, 81 Fed. Rep. 439; *Ainslie* v. *Kohn*, 16 Ore. 363, 19 Pac. Rep. 97; *Ice Co.* v. *Eastman* (Wyo.) 38 Pac. Rep. 680. There are authorities in irreconcilable conflict with the foregoing, among which may be cited *Hill* v. *Building Co.*, (S. D.) 60 N. W. Rep. 752; *Coleman* v. *Goodnew*, 36 Minn. 9, 29 N. W. Rep. 338; *Finane* v. *Improvement Co.* (N. M.) 5 Pac. 725, followed in *Minor* v. *Marshall* (N. M.) 27 Pac. 481. There is also a class of cases holding the absence of the jurat is fatal, which are based upon special statutory requirements relating to the affixing of the signature and seal of the officer. *Gates* v. *Brown* (Wash.) 25 Pac. Rep. 914; *Mill Co.* v. *McDonald* (Wash.) 32 Pac. Rep. 108. Our conclusions are not at variance with the line of authorities holding that the jurat is essential as preliminary proof that the contents of the affidavit were in fact sworn to, in cases where the affidavit is primarily to be used as evidence, or is to be presented to a public officer whose right or duty to act depends upon such affidavit. Such, in our view, is *McGillivray* v.

District Tp. (Iowa) 65 N. W. Rep. 974; also, *State* v. *Green,* 15 N. J. Law, 88.

Having reached the conclusion that the absence of the jurat is not fatal, and that evidence aliunde is admissible to show that the affidavit was properly sworn to, we have no difficulty in finding that it was so sworn to. Both the notary public and affiant so testify, and without contradiction. The affidavit itself also corroborates the statement of the notary that the acknowledgment was attached by an oversight. This appellant's account was then verified by affidavit. Its lien is a valid lien, inferior to plaintiff's, but superior to the interests of all the remaining defendants. *Heater Co.* v. *Gordon,* 2 N. D. 246, 50 N. W. Rep. 708.

After the testimony was in, arguments made, and findings presented, the Court, upon plaintiff's motion, reopened the case, and permitted further evidence to be introduced, against defendants' objection. This is urged as error. We do not think the record shows an unwarranted use by the trial court of its discretion in so doing. "It is a familiar rule of District Court practice for the trial court, after the evidence has been taken, in the exercise of judicial discretion, to reopen the case, and receive further evidence, at any time prior to filing its decision." *Second Nat. Bank* v. *First Nat. Bank,* 8 N. D. 50, 76 N. W. Rep. 504.

The judgment and decree of the District Court rendered and entered herein are reversed, vacated, and set aside; and in accordance with our findings herein, and the stipulation contained in the record, showing the amount due on the three subordinate liens, it is ordered and adjudged that the District Court enter judgment of foreclosure and sale herein, establishing plaintiff's lien as a first lien upon the premises described in the complaint for the sum of $9,125.65, with interest thereon from January 3, 1892, to the date of the judgment, at 7 per cent. per annum; also for plaintiff's costs and disbursements herein in both the District and Supreme Courts. The taxation of costs in the District Court already made will stand, and the costs of plaintiff in the Supreme Court are to be taxed in the usual way. The judgment of the District Court will direct that the person making the sale shall, after paying the expenses of said sale, and paying plaintiff the amount of his lien, with interest and costs and disbursements, pay to the defendant the J. W. Reedy Elevator Manufacturing Company the amount of its mechanic's lien upon said premises, which is hereby established at the sum of $2,609.01, with interest thereon from March 28, 1892, at 7 per cent. per annum, and also its costs herein in both District and Supreme Courts, to be taxed in the usual way. Out of any surplus in his hands, the person making the sale will pay the Guaranty Savings Bank of Manchester, N. H., the amount of its lien on said premises, fixed by the record, and hereby established as a third lien thereon, and inferior to the two mechanics' liens just referred to, at the sum of $54,227.16, with 7 per cent. interest thereon since October 5, 1898; and out of any surplus in his hands, after

paying said first three liens, with costs and disbursements, the person making the sale will pay the Security Trust Company the amount due upon its lien upon said premises, which is hereby established as a fourth lien thereon, subject to the three liens above referred to, at the sum as fixed by the record, to-wit, $14,289.66, with 7 per cent. interest thereon since October 5, 1898; and, should there be any further surplus remaining in his hands, the same is to be paid to the Grand Forks Investment Company, the owner of the premises in question. All concur.

(77 N. W. Rep. 340.)

ORCELIA CRANDELL *et al. vs.* JOHN R. BARKER.

Opinion filed December 28, 1898.

Wills—Construction—Domicile of Testator.

The provisions of a will relating to personal property situate in this state must be construed according to the law of the domicile of the testator at the time of his death.

Personal Property—Bequest—Law of Domicile.

The will of T., a resident of Pennsylvania, contained the following: "The mortgage I hold against John R. Barker and Maria J. Barker, for four thousand two hundred and thirty-five dollars ($4,235.00), dated June 14th, A. D. 1887, which covers some certain real estate in Grand Forks county, in Dakota, I give and bequeath the use and interest thereof to my daughter Maria J. Barker for and during the term of her natural life, and then to her children, if she should die leaving any. If my said daughter Maria J. shall die childless and without issue, then in that event I direct that said mortgage shall be equally divided between my daughters Barbara Knox and Orcelia Crandell, share and share alike." *Held*, that under the laws of Pennsylvania, Maria J., who survived her father, took a life interest in the mortgage, and, upon her death without issue living at the time of her death, said mortgage became the property of Barbara Knox and Orcelia Crandell.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by Orcelia Crandell and Barbara Knox against John R. Barker for the foreclosure of a mortgage of real estate, the ownership of which plaintiffs claim under the will of their father Charles Toles, and which said will was made, and probated in the State of Pennsylvania. The facts appear in the opinion. Plaintiffs had judgment and defendant appeals.

Affirmed.

Bosard & Bosard, for appellant.

Burke Corbett (*Cochrane & Corliss*, of counsel), for respondents.

BARTHOLOMEW, C. J. In this case we are charged with the duty of determining, as a matter of fact, what the law in the State of

Pennsylvania may be, as applicable to certain conceded facts. By stipulation, all the statutes and decisions of that commonwealth are before us. The plaintiffs brought an action to foreclose a mortgage upon certain real estate in Grand Forks county. From a decree in their favor the defendant appeals to this Court, the case being triable here de novo. The facts are as follows: In June, 1887, the defendant, John R. Barker, with his wife, Maria J. Barker, executed and delivered to Charles Toles, who was the father of Maria J. Barker, a mortgage upon the real estate in question, to secure a certain note given by said John R. Barker to said Charles Toles for the sum of $4,235. Thereafter, and in 1890, said Charles Toles, who resided in Tioga county, in said State of Pennsylvania, made his will. Said will contained, among other things, the following provision: "The mortgage I hold against John R. Barker and Maria J. Barker, for four thousand two hundred and thirty-five dollars ($4,235.00), dated June 14th, A. D. 1887, which covers some certain real estate in Grand Forks county, in Dakota, I give and bequeath the use and interest thereof to my daughter Maria J. Barker for and during the term of her natural life, and then to her children, if she should die leaving any. If my said daughter Maria J. shall die childless and without issue, then in that event I direct that said mortgage shall be equally divided between my daughters Barbara Knox and Orcelia Crandell, share and share alike." Barbara Knox and Orcelia Crandell, in said will mentioned, are the plaintiffs in this action. Prior to March 18, 1893, said Charles Toles died, and on said date his said will was duly proven and approved according to law in said Tioga county. Thereafter, and on October 26, 1895, said Maria J. Barker died childless and without issue then living, having theretofore borne several children, all of whom had died in her lifetime, and leaving her husband, John R. Barker, the defendant herein her sole heir at law. Subsequently these plaintiffs, claiming to be the owners of said mortgage under the terms of their father's will, demanded payment thereof from the defendant; and he, claiming to be the owner thereof as sole heir at law of his deceased wife, refused such payment; and this litigation is the result.

The property here in controversy, being a mortgage upon land in this state, is personal property, under Rev. Codes, § § 4699, 4700. A mortgage, in this state, conveys no estate in the land. It simply creates a lien thereon. This, then, being a gift by will of personal property, it follows that the validity and interpretation of the will must be governed by the laws of the testator's domicile. Id. § 3738; *Penfield* v. *Tower,* 1 N. D. 216, 46 N. W. Rep. 413.

It is the defendant's claim that, under the terms of the will of Charles Toles, Maria J. Barker took an absolute estate in said mortgage, under the celebrated rule in Shelly's Case,—a rule announced by Lord Coke in 1581, and which became a part of our common law, and is in force in the states of this Union, unless modified or abrogated by statutory enactments. Concededly, it

obtains in Pennsylvania. Lord Coke declared the rule in this language: "When the ancestor by any gift or conveyance takes an estate of freehold, and in the same gift or conveyance an estate is limited, either mediately or immediately, to his heirs in fee or in tail, 'the heirs' are words of limitation of the estate, and not words of purchase." This is an arbitrary rule, that never deigns to consider the intention of the grantor. If the words of the gift or conveyance bring the estate within the rule, it is seized and distributed under the rule, regardless of, and often in clear opposition to, to the intention of the grantor. But it is evident that in every case a preliminary question must be settled, and that is whether or not the terms of the gift or conveyance bring the estate within the operation of the rule. This, we think, is the difficult, as it is the decisive, question in this case. In its solution we get no aid from the rule itself. That is purely a rule of property, and not of construction. We are required to resolve this question as we may find the courts of Pennsylvania would resolve it, were it before them. The language is, "I give and bequeath the use and interest thereof to my daughter Maria J. Barker for and during the term of her natural life, and then to her children, should she die leaving any." If there were nothing further, there would be no doubt of the testator's meaning. The ancestor, Maria J., would indeed take a freehold estate, but there would be no remainder "to her heirs in fee or in tail." The case would fall outside the wording of the rule. The restriction of the remainder to the children of Maria J. would fix the character of the estate conveyed. In the hands of Maria J. it could not be a full estate of inheritance, because it would not, on her decease, go to her "heirs" or the "heirs of her body." It would become a full estate of inheritance only after it vested in the children, thus marking them as the source from which must spring the inheritable blood. And so are the decisions in Pennsylvania. Guthrie's Appeal, 37 Pa. St. 9. At page 15 the Court say: "But 'children,' in law, is as certainly held to be a word of purchase as 'heirs of the body' are to be words of limitation;" and again on page 21: 'But it has been held, from Wild's Case, 6 Coke, 288, down to the present day, that when the devise of the remainder is not to 'heirs' or 'heirs of the body,' but to 'children,' they take as a new stock, and not as heirs." The point is ruled the same way, and with equal emphasis, in *Oyster* v. *Oyster,* 100 Pa. St. 538. In each of these cases, however, it is conceded that the word "children" may be used by a testator as a nomen collectivum, signifying "heirs of the body." It is stated that the words "heirs of the body" or "issue," in their legal sense, are words of limitation, and the word "children" a word of purchase; and in Guthrie's Appeal Mr. Justice Strong says: "But the cases abundantly show that the intent not to use the words in their legal sense must be unequivocal; 'that it must appear so plainly' (to use the language of Lord Alvanley) 'that no one can misunderstand it.'" Again he quotes from Lord Hardwicke, in *Buffar* v. *Bradford,* 2 Atk. 222: "* * * 'Children,' in their na-

tural import, are words of purchase, and not of limitation, unless it is to comply with the intention of the testator, when the words cannot take effect in any other way." Further he quotes from Hayes' Elementary Essay (page 35): "The rules of construction freely permit, however, the use of the words 'heirs of the body' or 'issue' in the limited sense of children, and of the word 'children' in the comprehensive sense of 'heirs of the body'; these rules, or rather the fundamental principle of legal interpretation, requiring only a clear explanation to justify a departure from the ordinary meaning, imposing on those who would translate the term the onus of producing an express warrant under the hand of the author of the gift." And Justice Strong, in speaking of this comprehensive use of the word "children," says: "But I have found no case in which it has been held to have been so used, unless the testator has also employed the words 'heirs of the body' or 'issue' as descriptive of the same objects." He also says that the word "issue" is a word of doubtful meaning, though generally a word of limitation in a will. In *Oyster* v. *Oyster*, Mr. Justice Paxton said: "Without reviewing the learning upon this subject, it is sufficient to say that the authorities are uniform that 'children' is as certainly a word of purchase as 'heirs of the body' are words of limitation. Guthrie's Appeal, 37 Pa. St. 9; *Taylor* v. *Taylor*, 63 Pa. St. 481. This is the general rule, and the exceptions which from time to time have been recognized do not impair the rule itself. There are many instances in our state where 'children' has been held to be a word of limitation, but in all of them such construction was clearly in accord with the intent of the testator as gathered from the four corners of the will, as when 'children' has been used with 'heirs of the body' or 'issue' as its synonyms."

It is this conceded permission to use the word "children" in this comprehensive sense that creates the doubt in this case. Immediately after the use of the word "children" the testator adds: "If my said daughter Maria J. shall die childless and without issue, then in that event I direct," etc. Two positions are taken by appellant, and urged upon us with exhaustive ability and research. It is said that the testator, by the language used, referred to the death of Maria J. during the lifetime of the testator, and, as it is conceded that she survived the testator, the life estate vested in her, with remainder to her issue, and that the property could vest in these plaintiffs only upon an indefinite failure of issue of Maria J. Further, it is urged that, should we hold that the testator did not refer to the death of Maria J. in his lifetime, still the language used was equivalent to "issue" generally or "heirs of her body," and imported an indefinite failure of issue. Either position would bring this case within the rule in Shelley's Case.

The first point will not require extended notice. There is a class of cases which hold that in case of a devise to A. and his heirs, and, in case of his death without issue, then over to B., the death referred to is the death of A. in the lifetime of the testator. And

the reason which is almost universally assigned, and which is perfectly clear, is this: The estate first given to A. is in fee, but if it be held that (the estate having once vested in him), at his death without issue, it vests in B., then A.'s estate is reduced to a freehold. To avoid this result the law will hold that if A. survives the testator, and the estate once vests in him, he takes a fee, in accord with the wording of the devise, but, if he die in the lifetime of the testator, then the estate, when it passes from the testator, vests at once in B., he taking by substitution. In other words, this construction obtains only when the devise to the first taker is in fee, and not when it is a freehold merely. In re Biddle's Estate, 28 Pa. St. 59; Mickley's Appeal, 92 Pa. St. 514. In this latter case the syllabus reads: "If a bequest be made to a person, absolute in the first instance, and it is provided that in the event of death, or death without issue, another legatee or legatees shall be substituted to the share or legacy there given, it shall be construed to mean death or death without issue before the testator. The first taker is always the first object of the testator's bounty, and his absolute estate is not to be cut down to an estate for life without clear evidence of such intent." See, also, Robinson's Estate, 149 Pa. St. 418, 24 Atl. Rep. 297; *Mitchell* v. *Railway Co.*, 165 Pa. St. 645, 31 Atl. Rep. 67; *Coles* v. *Ayres*, 156 Pa. St. 197, 27 Atl. Rep. 375; Fitzwater's Appeal, 94 Pa. St. 141; *Stevenson* v. *Fox*, 125 Pa. St. 568, 17 Atl. Rep. 480; *McCormick* v. *McElligott*, 127 Pa. St. 230, 17 Atl. Rep. 896; *King* v. *Frick*, 135 Pa. St. 575, 19 Atl. Rep. 951. We think that is the rule in Pennsylvania, although it has sometimes been questioned. *Lippencott* v. *Warder*, 14 Serg. & R. 115; *Jessup* v. *Smuck*, 16 Pa. St. 327. We are not concerned as to the application of this rule of construction in other jurisdictions, but see 11 Am. & Eng. Enc. Law, 919, and cases cited in note 15. But, conceding the rule in Pennsylvania to be as stated, we think it is confined to those cases where the primary devisee is given an absolute estate. All the cases cited are of that character. The reason for the rule could only apply in cases of that character, and, while we do not say that no Pennsylvania case can be found giving the construction a broaded scope, yet we do not think such a case would be now followed. See further, on this point, *Wright* v. *Charley*, 129 Ind. 257, 28 N. E. Rep. 706; *Bank* v. *De Pauw*, 75 Fed. Rep. 775; *Vanderzee* v. *Slingerland*, 103 N. Y. 47, 8 N. E. Rep. 247. We do not think this will would be construed in Pennsylvania as meaning that the death of Maria J. must occur in the lifetime of the testator.

But did the testator, by the use of the words "die childless and without issue," refer to an indefinite failure of issue, or a failure of issue at the date of the death of Maria J.? If he intended an indefinite failure of issue, then the word "issue" was equivalent to "heirs of her body," and, with the preceding life estate to Maria J., created in her an estate tail in case the devise was real estate, which by virtue of the Pennsylvania statute of April 27, 1855, was

enlarged to a fee simple. The same language would probably vest an absolute interest in the legatee in a bequest of personalty without the intervention of the statute. 3 Jarm. Wills (5th Am. Ed.) 374, and cases cited. Many Pennsylvania cases hold that the terms "in default of issue," "if he die without issue," or "if he have no issue," when uncontrolled by other terms in the will, and unexplained, mean an indefinite failure of issue. See *Eichelberger* v. *Barnitz*, 9 Watts, 447; *George* v. *Morgan*, 16 Pa. St. 95; *Wynn* v. *Story*, 38 Pa. St. 166; *Haldeman* v. *Haldeman*, 40 Pa. St. 29; *Covert* v. *Robinson*, 46 Pa. St. 274; *Allen* v. *Henderson*, 49 Pa. St. 333; *Gast* v. *Baer*, 62 Pa. St. 37; Yarnall's Appeal, 70 Pa. St. 341; *Greenawalt* v. *Greenawalt*, 71 Pa. St. 483; Ingersoll's Appeal, 86 Pa. St. 240; *Morrison* v. *Truby*, 145 Pa. St. 540, 22 Atl. Rep. 972; *Potts* v. *Kline*, 174 Pa. St. 513, 34 Atl. Rep. 191. Many of these cases also serve as illustrations of the comprehensive use of the word "children." Other cases might be cited on this latter point. *Lapsley* v. *Lapsley*, 9 Pa. St. 130; *Hackney* v. *Tracy*, 137 Pa. St. 60, 20 Atl. Rep. 560; *Williams* v. *Leech*, 28 Pa. St. (4 Casey) 89; Potts' Appeal, 30 Pa. St. (6 Casey) 168; Naglee's Appeal, 33 Pa. St. (9 Casey) 89; *McKee* v. *McKinley*, Id. 92. We should conclude that all the cases cited from Casey were overruled in Guthrie's Appeal, were it not that some of them are cited to the same point in Yarnall's Appeal. But that does not affect the principle. It simply goes to its application in a particular case. It must be borne in mind, also, that without exception the foregoing cases related to devises of real property. In one or two cases personal property was included, but none of them related exclusively to personal property. There is no doubt that these cases establish the general rule that in construing a devise of real property the words "die without issue" or "in default of issue," and similar phrases, mean an indefinite failure of issue. But the Pennsylvania Reports are full of decisions where the Court has held that the general meaning of the phrase was restricted or controlled by the context. *O'Rourke* v. *Sherwin*, 156 Pa. St. 285, 27 Atl. Rep. 43; *Shalters* v. *Ladd*, 141 Pa. St. 349, 21 Atl. Rep. 296; *Peirce* v. *Hubbard*, 152 Pa. St. 18, 25 Atl. Rep. 231; *Nes* v. *Ramsay*, 155 Pa. St. 628, 26 Atl. Rep. 770; *Anderson* v. *Anderson*, 164 Pa. St. 338, 30 Atl. Rep. 304; *Cameron* v. *Coy*, 165 Pa. St. 290, 30 Atl. Rep. 843; *Tayor* v. *Taylor*, 63 Pa. St. 481; *Smith* v. *Coyle*, 83 Pa. St. 242; *Robins* v. *Quinliven*, 79 Pa. St. 333; *Daley* v. *Koons*, 90 Pa. St. 246; In re Miller's Estate 145 Pa. St. 561, 22 Atl. Rep. 1044. These cases also relate to real estate, and they conclusively show that each particular devise is made to rest upon its own special wording, and in construing the wording the prime object is to give effect to the testator's intentions. It is only when the wording thus construed brings the devise within the rule in Shelley's Case that the special intent of the testator is disregarded, and forced to yield to what the law declares was his general intent. And it is interesting to notice upon what slight shades of difference in mean-

ing the cases have been made to turn. In Guthrie's Appeal the language was: "I give and bequeath to my daughter Elizabeth, wife of James Bones, the use and life estate, in her own proper person (but without power to convey the same to any other person for any period or term), all my messuage, tenement, and lot or tract of land whereon she now resides with her husband, in the township of Brandywine, and county of Chester, which I purchased at sheriff's sale as the property of William Christman, and containing fifty acres, be the same more or less; and, at the decease of my said daughter Elizabeth, the said lot or tract of land and appurtenances I hereby bequeath to such of her children or their heirs as may survive her, as tenants in common,—that is, the child or children of any deceased child of hers shall hold the same interest and right that the deceased parent would have held if living." Held a life estate only in Elizabeth Bones. In Haldeman's Case, 40 Pa. St. 29, decided six months later, and the opinion written by the same learned jurist, the language was: "The residue of my estate, real, personal, and mixed (being much the largest portion), devise, leave, and will to all my children, share and share alike, with this reservation in regard to my three daughters, Sarah, Mary, and Susan: I will, direct, and charge my executors, or the survivors of them, to account for any pay over half-yearly to Sarah, Mary, and Susan, and to each of them, during their natural lives, the income or profit arising out of each of their share of the residue, and, after the death of either, then to descend and go to the child, and, if children, share and share alike. Should, however, either of my daughters, Sarah, Mary, or Susan, die, and leave no lawful issue, then such share or portion is to fall back again to the residue, and form a part of the same." Held an estate tail in the daughters named, which by virtue of the statute of 1855 was enlarged to a fee. This last case is said, in Yarnall's Appeal, to be the strongest case in the state as a test of the rule interpreting "child" or "children" as meaning the entire line of descent. But we will not consume further space in camparing these cases. As early as *Seibert* v. *Butz,* 9 Watts, 490, Chief Justice Gibson said: "But the courts have seized with avidity on any circumstance, however trivial, denoting an intent to fix the contingency at the date of the death." And as late as *Cameron* v. *Coy,* 165 Pa. St. 290, 30 Atl. Rep. 843, Mr. Justice Mitchell said: "The rule which was adopted by our earlier cases from the English authorities, and perhaps may still be called the general rule, is that the words 'die without leaving issue' presumably refer to an indefinite failure of issue, but this presumption will yield to a contrary intent apparent from the whole will *Middleswarth's Adm'r* v. *Blackmore,* 74 Pa. St. 414. And this Court has frequently said with great emphasis that it is the testator's actual intent that must govern, and where that is clear all technical rules of construction must give way to it. Reck's Appeal, 78 Pa. St. 432; Woelpper's Appeal, 126 Pa. St. 562, 17 Atl. Rep. 870."

When we seek for the intention of the testator in this case, we

do not think it difficult of detection. His daughter was a married woman. She had been the mother of children. Whether such children were living at the date of the will, the record does not disclose. The gift was to the daughter "for and during the term of her natural life, and then to her children, if she should die leaving any." Leaving any when? At the date of her death, of course. The date of the death of the legatee was, in the mind of the testator, the point of time that should determine whether the property went to the children or to the sisters of the first taker. With this thought in his mind he immediately adds: "If my daughter Maria J. shall die childless and without issue, then in that event," etc. Without issue when? At a time other and different from that he had in mind, or other or different from that at which she should die childless? We cannot reasonably believe it with the two contingencies thus closely linked together. In *Siebert* v. *Butz*, supra, the contingencies were, "Should one of my daughters die without issue or will," and Chief Justice Gibson said: "The daughter's will would speak at her death, and the contingency of dying without issue was evidently so closely coupled, in the testator's apprehension, with the idea of her dying with or without one, as to have been inseparable from it; and, though there may be an indefinite dying without issue, there can be no indefinite dying without a will." That language, slightly paraphrased, would meet this case exactly. But the appellant may say that this reasoning begs the question; that his contention is that the word "children," as used by the testator, is a synonym for the word "issue"; and that the testator's intention will be subserved by substituting the latter for the former. The bequest would then be to the daughter for life, "and then to her issue if she die leaving any." Any mind unfettered by technicalities would at once say that expression meant leaving any issue at the time of the death. And such is the general holding. An examination of the authorities shows that while the terms "die without issue," "in default of issue," and equivalent phrases, import a general or indefinite failure of issue, yet the words "die leaving no issue," when speaking of personal property, are held to mean issue living at the time of the death. 2 Jarm. Wills (5th Am. Ed.) 499, and note. But where in this entire bequest do we find anything that warrants us in assuimng that the testator did not use the word "children" advisedly? It is a word of well-understood signification, and, when used in the connection in which we here find it, is just as certainly a word of purchase as the words "heirs of her body" are words of limitation. It is to be construed as a word of limitation only—as Lord Hardwicke puts it (*Buffar* v. *Bradfor*, supra)—"when the words cannot take effect in any other way." While the word "issue," as we have seen, is a word of doubtful meaning, in a will it is usually a word of limitation, but is easily controlled. In *Daniel* v. *Whartenby*, 17 Wall. 639, Mr. Justice Swayne says: "While the rule is held to apply as well to wills as to deeds, the words 'issue of his body' are more flexible than the

words 'heir of his body': and courts more readily interpret the former as the synonym of 'children,' and a mere descriptio personarum, than the latter." And in *Powell* v. *Board,* 49 Pa. St. 46, after stating that the technical words "heirs of the body" might by the context be shown to be words of purchase, the Court say: "And it is equally certain that by the same means the word 'issue' may be shown to have been used as a word of purchase, meaning children, grand-children, etc. Being not strictly a technical word, never a word of limitation, except when used in a will, it requires even less to overcome the presumption that a limitation was intended by its use than is demanded to rebut the presumption arising from the use of the words 'heirs of the body,'" We cannot, in this bequest, permit the word of doubtful and uncertain meaning to overrule and hold for naught that which is certain. The case of *Daley* v. *Koons,* 90 Pa. St. 246, is so nearly identical with the case at bar that we may profitably quote from it. The devise there was as follows: "I give and devise to my daugher, Mary Ann Westafer, the farm on which I at present reside, situate in Newton township, containing one hundred and sixty-eight acres, more or less, for and during her natural life, and after her death to her children in fee; and in the event of my said daughter, Mary Ann, dying without issue, I then, after her death, give and devise said farm," etc. For the purposes of the question here under discussion, we can discover no difference in meaning between the language there used and that here involved. In deciding that case, Chief Justice Sherwood said: "To lay hold of the words 'dying without issue,' to convert her estate into a fee, so as to give her the power to dispose of it away from her children, if she had any, or away from her brothers and sisters and their heirs, if she had no children, would contravene and disappoint the manifest intention of the testator. Fortunately there is no adjudged case in this state or elsewhere which requires or would justify us in doing so. Mr. Jarman, in his valuable treatise on Wills, after referring to a number of authorities establishing the settled rule of construction to be that the words 'in default of such issue,' following an express devise to any particular branch of issue, as children, sons, or daughters, will be construed to refer to the issue before described, adds: 'It is well settled, also that words importing a failure of issue (without the word 'such'), following a devise to children in fee simple or fee tail, refer to the objects of that prior devise, and not to issue at large.' 2 Jarm. Wills (5th Am. Ed.) 372. The cases to which he refers fully support his position."

In the light of the authorities cited, we are clear that the laws of Pennsylvania require us to hold that the testator, in this case, when he made the bequest in question to his daughter Maria J., referred to a failure of issue at her death. But there is another ground upon which we think the decision of the lower court can rest in equal security. The authorities so far cited have treated in the main of real estate. In this case, as we have seen, the gift was personal

property. The rule in Shelley's Case has been expressly held in Pennsylvania to cover personal property. Cockin's Appeal, 111 Pa. St. 26, 2 Atl. Rep. 363. But we think the law must be regarded as settled in Pennsylvania that the words "die without issue," as applied to a bequest of personal property, always import a definite failure of issue at the death of the first taker. The rule was announced by Chief Justice Tilghman, in *Clark* v. *Baker*, 3 Serg. & R. 470, in these words: "These words, 'without leaving issue,' applied to personal estate, have been held to mean issue living at the death of the person to whom the property is given in the first instance. But not so with regard to land. This is the distinction taken in the case of *Forth* v. *Chapman*, 1 P. Wms. 667, and it is well founded, because it carries into effect the intention of the testator. It would answer no purpose to understand issue indefinitely, in the case of personal property, because the issue may take accordingly." It was reaffirmed in Meyer's Appeal, 49 Pa. St. 111; Eachus' Appeal, 91 Pa. St. 105; Snyder's Appeal, 95 Pa. St. 174. In Moorhead's Estate, 180 Pa. St. 119, 36 Atl. Rep. 647, the Supreme Court approved the following language used by the trial court: "There has been much learning expended upon the meaning of the words 'dying without issue,' and whether they import a definite or indefinite failure of issue; but it now seems to be settled that, when applied to personal property, it means issue living at the death of the person to whom the personalty is given in the first instance." We have no doubt of the existence of this rule. True, it has not always been applied, but this seems to be because the attention of the Court was not always called to the rule. We find no case that denies its existence. It follows, then, that, under the laws of the State of Pennsylvania, Maria J. Baker took only a life interest in the mortgage in question, and upon her death, leaving no children or issue her then surviving, the bequest over took effect, and Barbara Knox and Orcelia Crandell, the plaintiffs herein, became the owners of said mortgage. The judgment and decree of the District Court are made the judgment and decree of this Court. Affirmed. All concur.

(78 N. W. Rep. 347.)

BARBARA KNOX *vs.* JOHN R. BARKER.

Opinion filed December 28, 1898.

Will of Personal Property Construed by Laws of Testator's Domicile.

The provisions of a will relating to personal property situate in this state must be construed according to the law of the domicile of the testator at the time of his death.

Rule in Shelley's Case.

A citizen of Pennsylvania, by his will, which was duly probated in that state, declared: Item 6th. Another mortgage which I hold

against John R. Barker and Maria J. Barker, of one thousand three hundred and forty-five ($1,345.00) dollars, dated March 1st, 1887, covering certain lands in Grand Forks county, I give, devise, and bequeath the use and interest thereof to my daughters Orcelia Crandell and Barbara Knox, for and during the terms of their natural lives; and at their deaths I give and bequeath the said mortgage to the heirs of my said daughters Orcelia Crandell and Barbara Knox, share and share alike." *Held* that, under the laws of Pennsylvania, Orcelia Crandell and Barbara Knox, after the decease of the testator, became the absolute owners of said mortgage.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by Barbara Knox against John R. Barker. Judgment for plaintiff. Defendant appeals.

Affirmed.

Bosard & Bosard, for appellant.

Burke Corbett (*Cochrane & Corliss* of counsel), for respondent.

BARTHOLOMEW, C. J. Action to foreclose a mortgage on real property. Plaintiff claims to be the owner of the mortgage by virtue of the terms of her father's will. Defendant denies plaintiff's ownership. There was a decree for plaintiff, and defendant appeals.

The interest of a mortgagee of real estate situated in this state is personal property. Rev. Codes, §§ 4699, 4700. The original mortgagee, through whom plaintiff claims, was a resident of Pennsylvania. He died in that state, and his will was duly admitted to probate therein; and, so far as it relates to his interests as mortgagee in real estate in this state, his will must be construed under the laws of the State of Pennsylvania. Portions of this will were before us for construction in the case of *Crandell* v. *Barker*, 8 N. D. 272, 78 N. W. Rep. 347. Nearly every principle involved in this case was decided in that, although this is the converse of that. The provision of the will here involved is as follows: "Item 6th. Another mortgage which I hold against John R. Barker and Maria J. Barker, of one thousand three hundred and forty-five ($1,345.00) dollars, dated March 1st, 1887, covering certain lands in Grand Forks county, I give, devise, and bequeath the use and interest thereof to my daughters Orcelia Crandell and Barbara Knox, for and during the terms of their natural lives; and at their deaths I give and bequeath the said mortgage to the heirs of my said daughters Orcelia Crandell and Barbara Knox, share and share alike." It is alleged and admitted that the defendant has paid Orcelia Crandell the one half of the amount of said mortgage, and has paid to plaintiff the interest upon the other half to March 1, 1896, leaving the plaintiff the sole party beneficially interested in said mortgage. It is defendant's contention that she has no absolute title to the mortgage, and can only claim the interest thereon during her life. It will be noticed that the bequest in this case is to Barbara Knox and Orcelia Crandell for their lives, with remainder to their heirs, share and share

alike. There is no bequest over in this case, nor does the testator use the word "children" or "issue," but the technical word "heirs." Under the authorities cited in *Crandell* v. *Barker*, supra, there is no doubt but that this language, had the property been real estate, would have conveyed to Barbara Knox and Orcelia Crandell, under the laws of Pennsylvania, where the rule in Shelley's Case is in full force, an estate in fee. The authorities cited also show that the rule in Shelley's Case applies equally by analogy, to conveyances of personal property. And see, further, 22 Am. & Eng. Enc. Law, 512, and note. Indeed, it goes further, for words that would only create an entail in realty will create an absolute property or estate in personalty. Smith's Appeal, 23 Pa. St. 9; Mengel's Appeal, 61 Pa. St. 248. The judgment and decree of the District Court are made the judgment and decree of this Court, and are in all things affirmed. All concur.

(78 N. W. Rep. 352.)

ALVAH P. WEBSTER *vs.* JOHN MCGAUVRAN.

Opinion filed January 11, 1899.

Exemptions—Head of Family.

Under section 3625, Rev. Codes, an unmarried man who has residing with him, and under his care and maintenance, a married adult brother, who is unable to take care of or support himself, is the head of the family.

Schedule Need Not Disclose Claimant to Be Head of Family.

In the verified schedule of property which the law requires an exemption claimant to deliver to the officer who has levied upon his property, it is not necessary for the claimant to state that he is the head of a family.

Appeal from District Court, Cavalier County; *Sauter*, J.

Action by Alvah P. Webster against John McGauvran. Judgment for defendant. Plaintiff appeals.

Reversed.

J. C. Monnet, for appellant.

Gray & McMurchie, for respondent.

BARTHOLOMEW, C. J. This was an action to recover the value of a judgment in plaintiff's favor, and against one Pinkerton, which it is alleged the defendant wrongfully converted. The defendant was sheriff of Cavalier county. As such sheriff he received an execution issued upon a judgment in favor of C. Aultman & Co. and against this plaintiff. By virtue of said execution, the defendant proceeded to levy upon the judgment in plaintiff's favor against Pinkerton. Plaintiff claimed, or attempted to claim, such judgment as exempt from seizure under execution; but his claim was

disallowed by the defendant, who proceeded under certain statutory provisions authorizing the same, and concerning which there is no controversy, to assign such judgment to said C. Aultman & Co., the same being received by such party as cash to its face amount, and the defendant returned the execution satisfied to that extent. The case was tried to a jury, and at the close of the testimony each party moved for a directed verdict in his favor. Plaintiff's motion was denied, and that of the defendant was granted. Subsequently a motion for a new trial was overruled, and the judgment entered on the verdict. Plaintiff appeals from the judgment. The errors assigned are based upon the rulings denying plaintiff's motion for a directed verdict and granting that of defendant. The record does not disclose upon what ground the ruling of the court was based, and we are therefore left to inquire whether or not, in any view of the case, it was proper to direct a verdict for defendant. Since the seizure and transfer of the judgment are admitted by defendant, in order to sustain a directed verdict in his favor it must appear, either that plaintiff failed to properly claim such judgment as exempt, or that the same was not exempt as a matter of fact, or that the same was not exempt as a matter of law. As for the first point, we held in *Northrup* v. *Cross*, 2 N. D. 433, 51 N. W. Rep. 718, that a debtor who undertakes to select his exemptions must indicate to the officer holding the writ the specific property claimed, but that the selection could be made in any terms that the officer could not or ought not to misunderstand. It is the theory of our law that the debtor should deliver to the officer holding the writ a sworn schedule of all his personal property. It then becomes the officer's duty to have the same appraised. If the appraised value exceeds $1,500, the debtor or his agent may select, from all the personal property, articles of the value of $1,500, and the remainder is subject to the process. If, however, the appraisement does not exceed $1,500, the entire property is exempt, and no selections need be made. In this case the sworn schedule was delivered to the officer, but no appraisement was ever made, so that no opportunity for selection ever arose. The plaintiff did, however, in writing, specifically claim this judgment as exempt, and demanded its release. But it is said that the schedule was defective, in that it did not state that plaintiff was the head of a family. The statute (section 5520, Rev. Codes) does not require any such statement in the schedule. It leaves the officer to decide that question at his peril. This may be a defect in the statute, but it is so written. We have no doubt that the plaintiff took all steps necessary for him to take to secure the release of the property. It is urged that he based his claim under the wrong section of the statutes. That would not destroy his exemption rights. As a matter of fact, he claimed it under the laws of the state generally as well as under a specific statute.

It is defendant's main contention, however, that the plaintiff was not entitled to exemptions because he was not the head of a family.

He was an unmarried man, residing upon a farm. With him lived his brother, a man 60 years of age, and his brother's wife. Our statute (section 3625, Rev. Codes) thus defines "head of family": "The phrase 'head of a family' as used in this chapter includes within its meaning: (1) The husband or wife when the claimant is a married person; but in no case are both husband and wife entitled each to a homestead under the provisions of this chapter. (2) Every person who has residing on the premises with him or her, and under his or her care and maintenance, either: (a) His or her child or the child of his or her deceased wife or husband, whether by birth of adoption. (b) A minor brother or sister or the minor child of a deceased brother or sister. (c) A father, mother, grandfather or grandmother. (d) The father or mother, grandfather or grandmother of a deceased husband or wife. (e) An unmarried sister or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take case of or support themselves." The evidence in this case shows, without conflict, that plaintiff's brother who resided with him was afflicted with asthma; that he was unable to do manual labor, except that for an hour or two in the morning he would work in the garden, at the proper season of the year. He was practically without any means of support whatever, except a pension of $12 per month. His expenses for medicines were about $10 per month. He required more or less care all the time, and some days he required constant attendance. His wife was in good health, but possessed of no property or means of any kind. The plaintiff furnished all the provisions, clothing, and expenses necessary for the household. How long this condition of things existed is not clear from the record. It existed at the time of the levy and "prior" thereto, and it continued to exist from that time (May, 1896) until about December 1, 1897, at which time the afflicted brother went to Minneapolis, the plaintiff furnishing the means, and was still at Minneapolis, stopping with a sister, when this case was tried, on December 21, 1897. We think this conclusively shows that this was not a mere temporary arrangement, but that the afflicted brother was under the "care and maintenance" of plaintiff in the sense in which those words are used in the statute. It is argued, however, that the afflcted brother was himself the head of a family, under the section quoted; and that, if execution had been issued upon a judgment against him, he could have claimed exemptions as the head of a family; and hence to allow plaintiff the exemptions permitted to the head of a family would be giving two heads to the one household. That argument should have been addressed to the legislature. It can have no weight with a court in construing a statute the language of which is so plain that there is no room for construction. The second subdivision of the section declares every person to be the head of a family "who has residing on the premises with him or her and under his or her care and maintenance, either: * * * (b) A minor brother or sister or the minor child of a deceased brother

or sister;" or, "(e) An unmarried sister or any other of the relatives mentioned in this section who have attained the age of majority and are unable to take care of or support themselves." A brother is one of the other relatives mentioned in the section, and it is perfectly clear that the legislature intended to include a married adult brother. Under letter "(b)," a minor brother or sister is placed upon the same footing, but not so under letter "(e)," in speaking of adult brothers and sisters. There the sister must be unmarried, while no such restriction attaches to the brother. The reason for this is obvious. When a sister is married, the law presumes that the husband will suport her. It requires him to support her either from his estate or by his labor. And this is the almost universal condition that exists in society. The husband does support the wife. True, the law requires the wife to support the husband from her separate estate, if she have any, when he is unable to support himself, but it does not require her to support him by her manual labor (section 2765, Rev. Codes); and experience and observation teach us that, generally, she would be unable to support him by labor, however desirous of so doing she might be. Our statute simply recognizes these everyday conditions. All that it requires in case of an adult brother is that he should be unable to take care of and support himself. That such was the case in this instance cannot be questioned on this record. There is no conflict in the evidence whatever. The property, the value of which plaintiff seeks to recover, was seized by the defendant under execution and disposed of by him. Plaintiff properly claimed his exemptions. If the head of a family, he was entitled to hold the property as exempt. He was the head of a family, under the undisputed facts and the law. The judgment of the District Court is reversed, and a new trial ordered. Reversed. All concur.

(78 N. W. Rep. 80.)

STATE *ex. rel.* AUGUSTUS BAKER *vs.* N. F. BOUCHER.

Opinion filed April 13, 1899.

Statutes Construed—Constitution.

Section 118 of the state constitution, and sections 411, 442, 5176, and 7755 of the Revised Codes, construed.

Special Terms of District Court.

Held, that the District Courts of this state are authorized, under the constitution and laws of the state, to call special terms of the District Court, and to require the attendance of jurors at such terms, as at other terms.

Criminal Cases May Be Tried at Special Term.

Held, further, that at such special or additional terms of court the District Court may lawfully try issues of fact in criminal actions.

"Regular Term"—Construction.

The words "at a regular term of the court," contained in section 7755, Rev. Codes, construed to mean a term at which jurors are regularly drawn and summoned, whether such terms are regular or special, with respect to the manner of calling the same.

Application of Augustus Baker for a writ of habeas corpus. Denied.

Hildreth & Ingwaldson, for petitioner.

Morrill & Engrud, for the State.

WALLIN, J. The petitioner, while incarcerated in the state's prison at Bismarck, appplied to this Court for the writ of habeas corpus, and the same was issued and made returnable before this Court at a term held at Fargo on March 28, 1899. Petitioner claims that his said imprisonment is unlawful. The facts upon which this claim is made are set forth in the petition, and the same are wholly uncontroverted. It appears that an information was filed in the District Court for the County of Cass, at the Novermber, 1897, term of that court, charging petitioner with the crime of rape. After a plea of not guilty the case was continued, and was not tried at said term, nor at the succeeding February term. A trial was had, however, before said court, in the month of March, 1898, at which petitioner was found guilty by a jury, and subsequently sentenced by the Court to a term of imprisonment in the state's prison, which term has not yet expired. The trial of petitioner was not had at any term of court fixed or prescribed by legislative enactment, but was had at a term of court called by special order of the District Court, which order was as follows: "Fargo, North Dakota, February 14, 1898. A special term of the District Court of Cass county, North Dakota, is hereby called and ordered to begin on the 1st day of March, 1898, at the Court House in the City of Fargo, North Dakota, in due compliance with law. The same to be a jury term, and will be held for the trial of all actions, civil and criminal, of which said court has jurisdiction." Counsel for petitioner has not questioned the authority of the District Courts of this state to convene terms of court in addition to those expressly named by the statute; nor is the regularity of the call convening the term in question in any wise challenged. On the contrary, the sole contention of counsel is that the District Courts of this state are without authority to try an issue of fact in a criminal case at such called or special terms, or at any term other than at the regular terms expressly named in the statute. It is not contended that any irregularities of procedure occurred at the trial which resulted in defendant's conviction; nor is it claimed that the defendant interposed any objection at any time at or before his said trial to being tried at said term of court. As we have said, his sole contention is that the District Court was and is without authority to try an issue of fact in a criminal action at any called term of the District Court. We shall

pass over the point, made by the state's attorney, to the effect that, at most, the point suggested by petitioner is a mere irregularity occurring at the trial, and therefore it cannot be reviewed by this proceeding. Without specifically passing upon this question, we shall assume, for the purposes of this case, that the objection is one which goes to the jurisdiction of the District Court to try the petitioner at the term when it assumed to do so, and that the question is now properly before this Court for decision.

We notice, first, that it is elementary that at the common law courts of record were authorized to call terms of court for the trial of causes, and their right to do so in this state is expressly preserved by section 118 of the state Constitution, which is as follows: "Until the legislative assembly shall provide by law for fixing the terms of courts, the judges of the Supreme and District Courts shall fix the terms thereof." Since the adoption of the Constitution the legislative assembly has proceeded to divide the state into judicial districts, and has established terms of court therein in the several counties, and fixed the times and places of holding such terms. See Pol. Code, Art. 6; Rev. Codes, § 402. But in so doing, the legislature has not attempted to limit the primary and constitutional authority of these courts to call other or special terms of court, but, on the contrary, express provision has been made for doing so. The lawmaker has declared as follows: "Nothing contained in Article 6 shall be construed to restrict the power of the court or any judge to call and convene other terms of court in any of said counties, and require the attendance of jurors at the same in the manner provided by law." Rev. Codes, § 411. This section clearly recognized the authority of District Courts in this state to convene terms of court in addition to terms expressly named and provided for by Article 6, supra, and such terms have been and are of very frequent occurrence. The statute expressly authorizes the court to require the attendance of jurors at such terms, in manner and form as is done at regular terms of court, and not otherwise. Under these provisions of law we regard it as being entirely clear that the District Court, when convened at such called terms, and equipped with a jury regularly drawn and summoned pursuant to law, is possessed of every power which it can lawfully exercise at any term of court.

This view, as has been seen, is not questioned by counsel as a general proposition; but counsel insist that section 7755, Rev. Codes, embraces an express inhibition against the trial of issues of fact in criminal cases at a called term of the District Court. Counsel especially emphasizes the following language, contained in said section: "But issues of fact in all criminal actions and proceedings must be tried at a regular term of the court." Counsel further cites, as supporting his contention, section 5176, Rev. Codes, which in effect provides that issues of fact in both civil and criminal actions "must be tried in term time." The provisions of the last section do not, in our opinion, strengthen the petitioner's contention, in

view of the fact that the petitioner was tried in "term time" as a matter of fact, and at a term of court at which a jury was regularly called and in attendance. Hence, petitioner was tried and convicted in strict accordance with the provisions of section 5176, *i. e.* in term time. It must be confessed, however, that the language of section 7755 presents a much more serious question. The requirement that issues of fact in criminal actions "must be tried at a regular term of the court" is one introduced by the code commissioners, and is not found in any previous statute of the state, nor of the late Territory of Dakota. This language, when considered by itself, and given a literal construction, is not of doubtful import. We think that it is safe to say that the profession understand what is usually meant by a regular term of the District Court. But, in our judgment, it becomes necessary, in arriving at the legislative purpose, to construe the words we have quoted in connection with other language in the statutes which governs the procedure of the District Courts of the state, and particularly in connection with the language of the entire section from which the words are quoted. When so interpreted, we are inclined to hold that the particular language under consideration should not be given a narrow or technical meaning. In using these words, we think the legislature meant only to mark an exception or contrast to the other provisions of the section, whereby it is declared, in effect, that the District Courts of this state were no longer to be hampered by the common-law restriction, which required them to transact their business in term time, but, on the contrary, that such courts thereafter were to be "always open" for the exercise of their functions. But to this radical innovation there was to be one exception. The District Court was not to be thrown open at all times for trials of issues of fact in criminal cases. Such issues could not, after this enactment took effect, be tried at all times, but must be tried at regular terms; and by this we think the legislature only intended to say that such issues must be tried at terms of court at which jurors have been regularly drawn and summoned, with all the safeguards which the law has thrown around the calling of jurors to try issues of fact in the District Courts. Such safeguards are the same, whether jurors are drawn for a general or special term. Rev. Codes, § § 411, 442. As we construe the language, it means simply that issues of fact in criminal cases can be tried at a term of court at which jurors are duly assembled, and that the words "regular term," as here employed, were not intended to discriminate between a regular term and a special or called term of court at which a jury is convened. This view of the statute harmonizes the provisions of section 7755 with those of section 5176. In the latter the legislature was dealing with issues of fact in both civil and criminal actions, and there saw fit to say only that such issues should be tried in "term time," without restricting the trials to what are in strictness known as "regular terms" of court. This provision would seem to be a wise one, inasmuch as jury terms, whether regular or special, are

essentially the same, and in fact identical in their equipment and in all their practical aspects and modes of procedure.

We think the construction which we have given to these statutory provisions will give effect to the legislative purpose, and at the same time promote the prompt and economical administration of the law, by securing a speedy trial of persons accused of public offenses. Our conclusion is that the petitioner is not unlawfully restrained of his liberty by reason of being tried at a special term of the District Court. The writ is therefore discharged, and the petitioner is remanded to the custody of the warden of the state's prison.

YOUNG, J., concurs.

BARTHOLOMEW, C. J. (concurring specially). I reach the same conclusion that is announced in the opinion prepared by Justice Wallin, but I prefer to base my judgment upon the point upon which that opinion declines to rule. I regard the trial of the petitioner at a called term as an irregularity only, and a matter that does not reach the question of jurisdiction, and hence not available to the petitioner upon habeas corpus. The District Courts of this state are courts of general jurisdiction. They are clothed with full power to hear and determine all trails for felonies committed within their respective districts. I do not regard section 7755, quoted in the opinion of the majority, as effectual to destroy that jurisdiction. Rather, it created conditions the existence of which are essential to the exercise of that jurisdiction. But it has been often decided, and I regard it as a sound principle of law, that, where the existence of certain conditions are essential to the exercise of jurisdiction, the existence of such conditions may be waived, and will be regarded as waived unless insisted upon, in all cases where the general jurisdiction over the subject-matter is unquestioned. See 12 Am. & Eng. Enc. Law, 300, and cases cited in note 5. The most that can be said in the case at bar is that the condition prescribed by statute authorizing the exercise of jurisdiction—to-wit, the existence of a regular term—was not present when the petitioner was placed upon trial. But he went to trial without objection, nor was the point at any time presented to the trial court. Clearly, he waived the absence of the only condition that was lacking to enable the court to proceed with his trial at that time. He cannot raise the point by habeas corpus, and he is properly remanded.

(78 N. W. Rep. 988.)

Note.—In entitling the papers in habeas corpus proceedings, the state should be named as a party. Carruth v. Taylor, 8 N. D. 166, 77 N. W. Rep. 617.

GEORGE W. FOSTER *vs.* WILLIAM FURLONG, *et al.*

Opinion filed April 22, 1899.

Negotiable Promissory Notes—Extension by Parole.

Section 3936, Rev. Codes, construed, and *held*, that the time of payment contained in a promissory note cannot be extended by any oral agreement, when the oral promise or agreement to extend is based entirely upon the debtor's oral promise to pay the consideration for the extension at some future time.

Rights of Junior Mortgagee—Payment.

The holder of a junior lien, whose security it being reduced in value by the foreclosure of a prior lien, and the jeopardy of a possible foreclosure of another prior lien, as well as when it is being decreased in value by the nonpayment of interest due on such prior liens by the debtor, may, after such default, buy the prior liens, or pay the defaulted interest, and add the amount so paid to his liens, under section 4676, Rev. Codes.

Appeal from District Court, Cass County; *Pollock*, J.

Action by George W. Foster against William Furlong and Anna M. Furlong. Judgment for plaintiff. Defendants appeal.

Affirmed.

S. G. Roberts, for appellant.

The promise of defendants to pay amount due at the time to which payment was extended, with interest on accrued interest, was sufficient consideration for plaintiff's promise to extend the time of payment. § 3871 Rev. Codes; Bish. Conts. § 76; *Hind* v. *Goldslip*, 26 Am. Dec. 108; *Whitfield* v. *McLeod*, 1 Am. Dec. 651; *Goldspeed* v. *Fuller*, 71 Am. Dec. 572. The consideration is good whether executed or executory in whole or in part. § 3875 Rev. Codes. Parole evidence is competent to show that an old written instrument has been abandoned or that time and place of performance has been changed. 1 Greenl. Ev. § 303; Underhill's Ev. § 214; *Bannon* v. *Aultman Co.*, 49 N. W. Rep. 968; *Hubbard* v. *Fletcher*, 63 N. W. Rep. 612; *Schweider* v. *Laing*, 13 N. W. Rep. 33; *Raymond* v. *Krauskopf*, 54 N. W. Rep. 432. Plaintiff is estopped under his contract for extension from foreclosing his mortgage. *Hubbard* v. *Fletcher*, 63 N. W. Rep. 612; Wiltse Mtge. Foreclosure, § 52. Plaintiff cannot enforce payment under his lien for the amount paid for interest past due on a prior mortgage. § 4676 Rev. Codes. To entitle plaintiff to such remedy there must have been actual duress, or danger to his interest. *Wessell* v. *Land & Mtge. Co.*, 54 N. W. Rep. 922; *Joannin* v. *Ogilvie*, 52 N. W. Rep. 217; *Verycken* v. *Vanderbooks*, 60 N. W. Rep. 687; *Brumagin* v. *Tillighast*, 18 Cal. 271; *Radich* v. *Hutchins*, 95 U. S. 210.

Morrill & Engerud, for respondent.

Respondent concedes that a verbal contract may be made discharging a written contract in whole or in part. Such transaction is styled a release. § 3832 Rev. Codes. But a new contract, which supercedes the old obligation, is styled a "novation." §§ 3828, 3829 Rev. Codes. The new contract, whether a release or novation, must possess the elements of a contract, with this exception that a release may be effected by a writing without a new consideration. §§ 3830, 3832, 3826 and 3827 Rev. Codes. Unless the new contract, which it is claimed constitutes the release or novation, is required by statute to be in writing, it may be verbal. The verbal negotiation must amount to a new contract. *Piatt* v. *United States*, 22 Wall. 496; *Emerson* v. *Slater*, 22 How. 41. A contract imposing an obligation can be effected only in one of six ways, viz: Performance, accord and satisfaction, novation, release, alteration, or cancellation. § 2930 Rev. Codes. The extension agreement was not a release of either the notes or mortgages. Neither performance, accord and satisfaction, nor cancellation are claimed. There is no pretense that the oral agreement substituted a new obligation for the notes and mortgages. A new mortgage is not created because that must be in writing. § 4699 Rev. Codes. If the new agreement amounts to anything, therefore, it must be an alteration. A written contract can be altered only by a contract in writing. § 3936 Rev. Codes. The alleged agreement is not in writing, it is executory, not executed. It was invalid. § 4699 Rev. Codes. A mortgage is a special lien. §§ 4699, 4673, 4676 and 4677 Rev. Codes. When a special lienholder is required to pay a prior lien for his own protection, he may collect the amount as a part of the claim secured by his own lien. § 4676 Rev. Codes; *Robinson* v. *Ryan*, 25 N. Y. 320; Field's Code, § 1585; Deering's California Code, § 2875-2876 and n.; Wiltse on Mtge. Foreclosure, § 452. Each installment of a debt secured is treated as a separate mortgage. § 5847 Rev. Codes. A party having the right to redeem from foreclosure may before sale on account of a defaulted installment of principal or interest pay the amount in default. §§ 5875, 5876 Rev. Codes. Interest coupons are installments and are enforceable independently of the principal note. *Boyer* v. *Chandler*, 43 N. E. Rep. 803; *Trustees* v. *Lewis*, 26 L. R. A. 743; *Clark* v. *Iowa City*, 20 Wall. 583. Even if interest coupons had not been given the mortgage could be foreclosed for the interest in default, without prejudice to the right to foreclose for a subsequent default. *Bank* v. *Johnson*, 53 Cal. 99; *Boyer* v. *Chandler*, 43 N. E. Rep. 803.

YOUNG, J. This case comes to us for trial anew upon an appeal from a judgment and decree of foreclouse entered in the District Court of Cass county in plaintiff's favor. The plaintiff is the owner of two mortgages executed by the defendants, covering 320 acres of land situated in Cass county. One of the mortgages secures two notes; the other secures one. Each note bears 10 per cent. interest, both before and after due. The notes show upon their face that they were due April 16, 1897, October 16, 1896, and

December 9, 1897, respectively. There were two prior mortgages upon the same property. The first, for $1,400, secured a principal note for that sum, together with separate interest coupons, representing the yearly interest, at 7 per cent. per annum, all secured in the one mortgage. The second was in favor of the Fargo Loan Agency, and secured the amount of their commission in negotiating the first mortgage loan. This second mortgage was foreclosed, and sheriff's certificate issued to the Fargo Loan Agency, March 6, 1897. In January thereafter, the plaintiff, with a view to protect his subordinate liens, purchased this certificate. As a part of the transaction which resulted in the purchase, and as the only condition on which the holder would formally assign the certificate of sale to him, the plaintiff paid to the loan agency, in addition to the amount due upon the certificates, the sum then due upon two first mortgage interest coupons, which were then past due, and in the hands of the loan agency for collection. Some time later the defendants redeemed from this foreclosure, but in so doing did not include the amount paid upon the two coupons. Plaintiff now seeks to foreclose his mortgages, and to add to the debt secured by them the amount paid by him to the loan agency as interest on the first mortgage. Defendant's resist the foreclosure upon two distinct grounds: First, they rely upon an alleged oral agreement made in October, 1897, between plaintiff and them, whereby the time of payment was extended for a period of one year thereafter, as they contend; second, it is insisted that in any event the amount paid to the loan agency as interest upon the first mortgage cannot be added by plaintiff to the amount secured by his mortgages. Acting upon these views, the defendants, within the period of the alleged extension, but subsequent to the commencement of these foreclosure proceedings, made proper tender and deposit of the amount due upon their three notes, omitting to add thereto the accrued costs and disbursements on the foreclosure, and the additional amount paid by plaintiff to the loan agency, which course was entirely proper, if their position is correct.

We will first consider the matter of extension of time. The facts relative to this alleged agreement are in great doubt; but assuming defendants' contention is true, and that on October 20, 1897, the defendants did orally promise to pay 10 per cent. interest upon the then accrued interest, which they were not bound to pay by the notes themselves, in consideration of which plaintiff also orally promised to extend the date of all payments for the period of one year from that date, is such an agreement operative to extend the time of payment? We think not. The authorities are in almost complete harmony in holding that the time of payment fixed by a written contract may be suspended or enlarged by an independent executed oral agreement. We cite but a few of the very numerous cases: *Bank* v. *Pearsons*, 30 Vt. 711; *Dunham* v. *Downer*, 31 Vt. 247; *Warner* v. *Campbell*, 26 Ill. 282; *Flynn* v. *Mudd*, 27 Ill. 323; *Danforth* v. *Semple*, 73 Ill. 170; *Myers* v. *Bank*, 78

Ill. 257. It will be found upon examination that these cases are based upon the principle that, where a consideration has actually been paid to the creditor by the debtor for the extension, the oral agreement is so far executed as to bind the creditor to the performance of his promise to extend. Other cases, however, hold that the mere oral promise to extend is sufficient, even when based only upon an oral promise to pay the consideration for the extension at some future time. *Wheat* v. *Kendall,* 6 N. H. 504; *Bank* v. *Woodward,* 5 N. H. 99; *Bailey* v. *Adams,* 10 N. H. 162. Contra, *Berry* v. *Pullen,* 69 Me. 101. This apparent confusion in judicial opinions is set at rest in this state by a legislative confirmation of the opinions of the majority of the courts, and, as we think, the better view, that the time of payment provided in a written contract may be enlarged or suspended by an executed oral contract, but not by one entirely promissory. Section 3936, Rev. Codes, reads as follows: "A contract in writing may be altered by a contract in writing or by an executed oral agreement and not otherwise." This alleged oral agreement to extend the time of payment had for its sole purpose the alteration of the written contracts by changing the times of maturity of the notes to a later period. It was not in writing. It was not executed, but, on the other hand, was unexecuted by either party, and entirely promissory on both sides, and therefore entirely insufficient to create an extension under the prohibition of the above statute.

It is also urged that the payment by the plaintiff of the interest coupons to the Fargo Loan Agency was made without actual duress or danger to his interest, was a voluntary act, and that he cannot recover the sum so paid,—much less, add it to his mortgage liens. This we will now consider. Plaintiff's mortgages were special and junior liens upon this property. The notes were past due and unpaid. One of the senior mortgages had been foreclosed, and a sheriff's certificate issued, upon which a deed would subsequently issue, entirely cutting off plaintiff's security. The interest upon the first mortgage was in default two years, and the coupons were drawing 12 per cent. interest. Under these conditions the plaintiff paid the first mortgage coupons. Had he a right to do so? If so, can he include the amount so paid in the foreclosure of his mortgages? Both questions must be answered in the affirmative. Section 4676 Rev. Codes, provides as follows: "A special lien is one which the holder thereof can enforce only as a security for the performance of a particular act or obligation and of such obligations as may be incidental thereto. When the holder of a special lien is compelled to satisfy a prior lien for his own protection, he may enforce payment of the amount so paid by him as a part of the claim for which his own lien exists." This section, applied to the facts existing, governs this case. The compulsion under which a junior lienholder acts in paying a prior lien is not the duress or coercion, nor the stress of circumstances, inducing one to pay an unjust and unlawful claim to protect some interest which he may

have. In such a case the question as to whether the payments were voluntary or involuntary would be proper for consideration in an action to recover back the amount so paid. But that is not this case. The compulsion with which one acts in paying a prior lien, and which entitles him to add the amount so paid to his lien, is merely an existing necessity to do so to protect his own interests under his lien, after the party primarily liable to make the payments has defaulted in so doing. The facts in this case clearly disclose that necessity. The value of plaintiff's mortgages was impaired by the foreclosure, and his security was being steadily reduced by the constantly increasing amount of the prior liens, all resulting from defendants' failure to make their payments when due. Under the facts as they appear, plaintiff had a right to pay the coupons, and also to add the sum so paid to the amount secured by his lien. The conclusions of the District Court were correct, and its judgment and decree entered herein are affirmed. All concur.
(78 N. W. Rep. 986.)

STATE OF NORTH DAKOTA *vs.* SIMON KLECTZEN.

Opinion filed April 26, 1899.

Occupation Tax—Peddlers License.

An act of the Sixth legislative assembly, Ch. 118, Laws 1899, entitled "An act taxing the occupation of hawking and peddling, and regulating the licensing of persons engaged in such occupations," construed, and *held*, to be a measure intended to produce revenue by taxing the occupation of peddling; and *held*, further, that the same was also intended as a police measure to regulate such occupation.

Constitutional Restriction.

Said statute nowhere states or indicates the objects or purposes of the tax, nor does it declare how the revenue to be derived thereunder is to be applied. Accordingly, *held*, that the act is repugnant to the provisions of section 175 of the state constitution, and therefore void.

Police Power.

Held, further, that it cannot be sustained as a measure of police regulation after the revenue features of the act are eliminated as unconstitutional.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Information against Simon Klectzen for peddling without a license. From a judgment sustaining a demurrer to the information, the state appeals.

Affirmed.

Ledru Guthrie, for appellant.

The police power of the state can only be exercised by legislative

enactment. It rests solely in legislative discretion to determine when the public welfare or safety requires its exercise. A statute regulating trade, when questioned in a judicial tribunal, cannot be made to depend for its validity upon the motives that may be supposed to have influenced the legislature. Tiedeman's Lim. Police Power, § 2; *Lakeview* v. *Rose Hill Cemetery Co.*, 70 Ill. 192; *Toledo Ry. Co.* v. *Jacksonville*, 67 Ill. 37; S. C. 16 Am. Rep. 611; *Munn* v. *Illinois*, 94 U. S. 113; 17 L. Ed. 385. The presumption is that the license fee prescribed by the act is a reasonable one, unless the contrary plainly appears. Cooley's Tax'n, 40, 410; Dillon Mun. Corp. (3d Ed.) § 358; *Ash* v. *People*, 11 Mich. 347; In re Wan Yin, 27 Fed. Rep. 701. The law may be upheld as a tax. *State* v. *Wordin*, 56 Conn. 226; *Northwestern F. Co.* v. *Hyde Park*, 97 U. S. 659.

Bosard & Bosard, for respondent.

The license fee charged is greatly in excess of the cost of issuing the license, and cannot be sustained as a police regulation. *State* v. *O'Connor*, 5 N. D. 629; *State* v. *Glavin*, 34 Atl. 708; *City* v. *Spiegel*, 75 Mo. 146; *Benson* v. *City*, 33 N. J. L. 380; *North Hudson Ry. Co.* v. *City*, 41 N. J. L. 71; *Muhlenbrinck* v. *Commissioners*, 42 N. J. L. 364; *Clark* v. *New Brunswick*, 43 N. J. L. 175; *Mayor* v. *Second Ave. Ry. Co.*, 32 N. Y. 261; *State* v. *Moore*, 18 S. E. Rep. 342; *Chaddock* v. *Day*, 4 L. R. A. 809; *Youngblood* v. *Sexton*, 32 Mich. 419; *Chilvers* v. *Peo.* 11 Mich. 43; *Littlefield* v. *State*, 28 L. R. A. 588; *Willis* v. *Standard Oil Co.*, 52 N. W. Rep. 652; *City* v. *Nodine*, 26 Hun. 512; *State* v. *Wagoner*, 69 Minn. 206, 38 L. R. A. 677.

Templeton & Rex, for respondent.

Whatever the power of the legislature may be in regard to raising revenue it cannot under the guise of a license impose a prohibitory or unreasonable fee on the business of peddling. *Chaddock* v. *Day*, 75 Mich. 527, 42 N. W. Rep. 977; *City* v. *New Haven Water Co.*, 44 Conn. 105; *State* v. *Moore*, 18 S. E. Rep. 342. Peddling is not inherently harmful, though an appropriate subject of police regulation. *State* v. *Wagoner*, 69 Minn. 206. Such regulation cannot be carried to the point of indirect prohibition. Const. N. D. Sec. 1; *Butchers' Union S. H. Co.* v. *Crescent, etc., Co.*, 111 U. S. 746; Tiedeman Lim. Pol. Power, 290. The legislature cannot enact an occupation tax. Sec. 176 Const. Where the constitution specifically mentions occupations which may be taxed the right to tax others is denied. *Banta* v. *Chicago*, 50 N. E. Rep. 233-237. The matter of licensing peddlers is provided for by the constitutions of Nebraska, Virginia and Massachusetts. *City* v. *Ins. Co.*, 41 N. W. Rep. 140; *City* v. *Norfolk*, 28 S. E. Rep. 959; *Connecticut Mut. Ins. Co.* v. *Com.*, 133 Mass. 161. A similar constitutional limitation to our own is found in Minnesota. Const. Minn. Art. ix, § I. It has been twice construed. *Willis* v. *Stand-*

ard Oil Co., 50 Minn. 290, 52 N. W. Rep. 652; *Minces* v. *Schoenig*, 75 N. W. Rep. 711. The law violates section 175 Const. *Pittsburg C. & St. L. Ry. Co.* v. *State*, 49 Ohio St. 189, 30 N. E. Rep. 435.

WALLIN, J. Upon the record in this case, the sole question which is presented for the decision of this Court is whether a certain statute is a constitutional and valid enactment. The statute in question was enacted at the late session of the legislative assembly of this state, and is entitled as follows: "An act taxing the occupation of hawking and peddling, and regulating the licensing of persons engaged in such occupation." The statute contains seven sections, the several provisions of which may be summarized as follows: Section 1 forbids peddling in any county in this state without first obtaining a license so to do from the county auditor. Section 2 requires persons desiring a license to peddle in any county to make a written application to the auditor of such county for a license, and to state "in what manner the applicant desires to travel as a peddler, whether on foot, or with one or more horses or other beasts of burden." Section 3 is as follows: "Each applicant, before he shall be entitled to such license, shall pay into the county treasury of the county where such application is made, the following sums respectively as and for the taxes due from him on account of the pursuit of the occupation of peddling. to-wit: If for a license to travel on foot the sum of $25; if for a license to travel and carry his goods with a single horse, or other beast carrying or drawing a burden, the sum of $100; if for a license to travel with a vehicle or carriage drawn by two or more horses, or other animals, the sum of $150. Said license shall authorize the holder thereof to pursue within said county the business of hawking and peddling in the manner set forth in said license for the period of one year from the date of its issue, and no longer." Section 4 requires the auditor, upon filing a written application for such license, together with the treasurer's receipt for the proper fee, to grant a license to peddle in such county for the period of one year, and for no other or shorter period. Section 5 requires the auditor to make a certain record of the transaction. Section 6 imposes criminal penalties for peddling in any county without such license, and the same penalties are prescribed for the offense of refusing, upon request, to produce such license for examination. Section 7 declares that "nothing contained in this article shall be so construed as to impair, interfere with or take away any existing rights or authority of incorporated cities, towns and villages to license and regulate peddlers within their incorporated limits."

Counsel contend that this statute is unconstitutional as a taxing measure, in this: that it violates section 176 of the state constitution, which provides that "laws shall be passed taxing by uniform rule all property according to its true value in money;" and in support of this point counsel cite the case of *Willis* v. *Oil Co.* (Minn.) 52

N. W. Rep. 652; also, from the same state, the case of *Minces* v. *Shoenig*, 75 N. W. Rep. 711. In both of these cases the Court was considering a provision of the constitution of the State of Minnesota which is practically the same as section 176 of the constitution of North Dakota. The first case cited arose under a statute which authorized an inspection of illuminating oils, and required that certain inspection fees should be paid by the owner for inspecting the oil. The Court upheld this statute as a police regulation, and stated that the law could not be sustained as a taxing measure, because it would run counter to the provision of the constitution of that state "requiring taxes to be as nearly equal as may be and to be levied on a cash valuation." Const. Art. 9, § 1. The fees for inspecting the oil, if regarded as a tax upon the oil, would be a tax which would not be uniform, and one also not based upon the value of the property. In the other Minnesota case (a city ordinance requiring auctioneers to pay a license fee for the privilege of selling certain classes of goods, and in addition to pay a per cent. upon the gross sales of such goods) the Court said, in effect, that the requirement to pay a per cent. on the sales was a tax upon the property sold, and was void as a tax, because it was not uniform, and was not based upon any cash valuation; but the other feature of the ordinance was sustained. We regard neither of these cases as being in point, because the statute under consideration nowhere attempts to lay a tax upon property, and from this it follows that constitutional restrictions upon legislation imposing taxes upon property are inapplicable to the statute in question. In our judgment, the act under consideration, in so far as it may be called a tax law, is an occupation tax law, framed to derive revenue from the occupation of peddling, and hence the same is not restricted by the constitutional requirement of valuation and of uniformity. Cooley, Tax'n, 570; 25 Am. & Eng. Enc. Law, p. 480, and notes 2, 3. It is our opinion that this law was enacted to effect a twofold purpose: It seems to be designed both as a revenue measure, and as a means of regulating the occupation of peddling; and in this double aspect the statute is referable both to the police power inherent in the state, and the authority to impose taxes. It is true that many cases can be found holding that subordinate political bodies, which have no original and inherent power of taxation, are without authority to tax an occupation under a charter delegating the right to regulate only; but with the sovereign state, which possesses plenary power, unless expressly restricted by organic law, both to tax and to regulate, there is no such limitation of authority. Hence it is that laws are sometimes passed to accomplish the double purpose of regulation and revenue. See *Kitson* v. *Mayor, etc.*, 26 Mich. 325; Cooley, Tax'n (2d Ed.) pp. 570, 597. A license measure may include a taxing measure, or it may not. If its chief purpose is clearly to regulate, and nothing else, it then falls within the

police power. In such cases the exaction must not be any greater than is necessary to effect the primary object in view, viz: regulation. *Mays* v. *City of Cincinnati*, 1 Ohio St. 268. This rule is well established; but the matter of regulation may embrace more than a mere license fee, and include expenses which are incidental and indirect as well as those clearly growing out of the business licensed. See the Minnesota cases above cited. And in the case of *Minces* v. *Shoenig*, supra, the Court uses the following significant language: "The very fact that a license is required tends to exclude dishonest or otherwise unfit persons from conducting such sales." This is equivalent to holding that the exaction of a license fee is in itself a police regulation, and we think that such fee might be very efficient as a police regulation, under this statute, as tending to diminish the number of persons who would engage in the business of peddling and hawking within the state. It is manifest that one of the purposes of the statute is to regulate the business of peddling. The act grants the privilege to exercise the calling of a peddler, upon certain conditions, and withholds the privilege from all who fail to comply with such conditions. In this aspect, it is a measure of regulation. See 25 Am. & Eng. Enc. Law, p. 15, and note 1; Cooley, Tax'n, p. 573. Moreover, as has been seen, there are certain clearly regulative features embraced in the act. The exaction of a license is, in our judgment, designed as a regulation, and the requirement that the peddler shall, on demand, produce his license, is also a regulative feature; and, as has been seen, the payment of a fee, especially as in this case, where the same is considerable in amount, would certainly tend to diminish the number of those engaging in the business, and consequently tend, in a degree, to restrict and regulate the business.

Whether the statute is also designed in part as a revenue producing measure is perhaps a question of greater difficulty, but we are inclined to hold that it was so designed. In the first place, it may be said, as a matter of common knowledge, that the occupation of peddling in this state is carried on by a class of transients and strangers, who usually stay in one community but a few days, and rarely, if ever, remain in any county for the period of one full year. In view of this well-known custom, it would seem that a license for a much shorter period than a year—say for a week or a month—would be sufficiently long to accomplish all purposes of mere police regulation. This law, however, will permit no license to be issued for a shorter period than 12 months, and from this we think it fair to infer that the matter of revenue was a prominent consideration in passing the law. But the terms of the act lead to the same conclusion. Section 3, above set out, requires that the applicant "shall pay into the county treasury of the county where such application is made the following sums respectively, as and for the taxes due from him on account of the pursuit of the occupation of peddling." This explicit declaration hardly leaves room for doubt that the idea of revenue by taxation was prominently before the lawmaker in en-

acting this statute. But, if any doubt could arise on the point, a reference to the title of the act will tend to dispel such doubt. The title unmistakably shows the intention to tax as well as to regulate. We do not feel at liberty to override the express language of the law, as it would be necessary to do if we construed the same as a mere police regulation, to the exclusion of any idea of revenue.

This brings us to the decisive question in the case. Counsel for the defendant contends that this statute is enacted in violation of the provisions of section 175 of the state constitution, which reads as follows: "No tax shall be levied except in pursuance of law and every law imposing a tax shall state distinctly the object of the same, to which only it shall be applied." As we have said, the act under consideration is designed in part as a tax law; and as such, therefore, it must be construed, in so far as it is a revenue producing measure. An examination of the law reveals the fact that it nowhere states the object of the tax which the law exacts from the peddler. From the terms of the act, it cannot be ascertained how the funds to be derived from it are to be applied, or to what objects or purposes the same are to be devoted. In this we think the law wholly fails to conform to the requirements of the constitution. For this reason we shall hold that it is void, and never took effect as a law. It is obvious that it cannot stand as a mere measure of police regulation, if the various sums named in it cannot be exacted of the applicant for a license. By the terms of the act, the license cannot issue until the tax is paid. It is true that section 3 of the statute requires the license tax to be paid into the county treasury. But this, in our opinion, falls short of indicating the object of the tax. All taxes, whether state, county, city, or school, are paid into the county treasury, because, under the law, the treasurer of the county is the tax collector of all classes of taxes; but the disposition to be made of the proceeds of taxes when collected depends wholly upon the terms of the law under which each is levied and collected. In this respect the statute in question is wholly silent. The provisions of section 175 of the state constitution are clear and unambiguous, and the same are mandatory upon the legislature, and hence we are compelled to hold that the statute is repugnant to the constitution. The same conclusion has been reached by other courts under similar constitutional provisions. Section 175 is a literal reproduction of section 5 of article 12 of the constitution of the state of Ohio. See *Pittsburg, C. & St. L. Ry Co.* v. *State*, 49 Ohio St. 189 (opinion, 198), 30 N. E. Rep. 436. In the case cited the Court held that a certain statute, which, as appeared, was enacted as a revenue measure by the legislature of Ohio, and which required that the revenue derived under it should be paid into the state treasury, was unconstitutional because it omitted to declare the object or purpose of the tax. This case is exactly in point here. See, also, to the same effect, *Westinghausen* v. *People*, 44 Mich. 265, 6 N. W. Rep. 641. In the case last cited the Court sustained a law which declared that a tax should be placed in the contingent fund, as

being a sufficient compliance with the constitution of Michigan, but the statute we are construing contains no similar provision as to the disposition of the funds to be derived under it. This statute, as has been seen, refers to no fund. The judgment of the District Court will be affirmed. All the judges concurring.

(78 N. W. Rep. 984.)

STATE *vs.* JOSEPH KOERNER.

Opinion filed April 29, 1899.

Voluntary Intoxication No Defense to Crime.

Voluntary intoxication of a defendant is never to be considered by the jury for the purpose of justifying or excusing the commission of a crime which has in fact been committed.

Larceny—Criminal Intent.

Section 6815, Rev. Codes, which provides that the intoxication of one accused of crime may be considered by the jury in determining the particular purpose, motive, or intent with which the acts were committed, when such purpose, motive, or intent is necessary to constitute a particular species or degree of crime, construed, and *held*, that larceny, which is a crime requiring the existence of the specific intent to deprive another of the property taken to constitute the crime, is included thereunder, and that the intoxicated condition of the defendant may be shown, to be considered by the jury for the purpose of determining whether this intent actually existed.

Refusal to Permit Evidence of Intoxication—Error.

The defendant, as for a defense, offered to show his intoxicated condition at and just prior to the commission of the alleged larceny, as bearing upon the existence of the intent. *Held*, that the rejection of the evidence was error.

Purpose of Evidence of Intoxication.

Held, further, that the purpose of the admission of this class of evidence is not to justify or excuse the crime, but to aid the jury in determining whether, in fact, the crime has been committed.

Appeal from District Court, Cass County; *Pollock*, J.

Joseph Koerner was convicted of larceny, and appeals.

Reversed.

A. T. Cole, for appellant.

Drunkenness is admissable in evidence on the question of intent, where the intent is an element in the offense without which the offense could not be committed. *Peo.* v. *Blake*, 4 Pac. Rep. 1; *State* v. *Bell*, 29 Ia. 316; *Scott* v. *State*, 12 Tex. App. 31; *Wenz* v. *State*, 1 Tex. App. 36; *Cross* v. *State*, 12 N. W. Rep. 425; *State* v. *Donovan*, 16 N. W. Rep. 206; *State* v. *Grear*, 13 N. W. Rep. 140; *Latimer* v. *State*, 76 N. W. Rep. 207; *O'Grady* v. *State*, 54 N. W. Rep. 556; *Hill* v. *State*, 60 N. W. Rep. 916; *Head* v. *State*, 61 N. W. Rep. 494; *Dobney* v. *State*, 64 N. W. Rep. 446; *Ford* v. *State*, 64 N. W. Rep. 1082; *State* v. *Garvey*, 11 Minn. 95; *State* v.

Gut, 13 Minn. 315; *State* v. *Welch,* 21 Minn. 22; *Peo.* v. *Harris,* 29 Cal. 678; *Roberts* v. *Peo.,* 19 Mich. 401; *Peo.* v. *Walker,* 38 Mich. 156; *Cline* v. *State,* 1 N. E. Rep. 22; *Barber* v. *State,* 39 Ohio St. 660; *Wood* v. *State,* 36 Am. Rep. 13; *Fisher* v. *State,* 64 Ind. 435; *Cummins* v. *Peo.,* 11 N. W. Rep. 184; *Ty.* v. *Davis,* 40 Pac. Rep. 359; *Close* v. *State,* 10 S. W. Rep. 242; *Cleveland* v. *State,* 5 So. Rep. 246; *Terrill* v. *State,* 43 N. W. Rep. 243; *State* v. *Johnson,* 40 Conn. 136; *U. S.* v. *Meagher,* 37 Fed. Rep. 875.

Fred B. Morrill, for respondent, cited *People* v. *Odell,* 1 Dak. 189, 46 N. W. Rep. 601.

YOUNG, J. The defendant was tried and convicted of the crime of grand larceny in the District Court of Cass county at the November, 1898, term. Thereafter a motion for a new trial was made on his behalf. This was denied, and on December 6, 1898, he was sentenced to one year in the state penitentiary.

This appeal is based entirely upon errors of law. While the specifications of error are several in number, we need not treat them separately in this opinion; for they are either rendered unimportant, or are determined, by the conclusion which we have reached as to the one error of the trial court in entirely excluding all evidence offered by the defendant to show his intoxicated condition at the time of the alleged offense. At the close of the state's case this offer of testimony was made: "The defendant now offers, as his defense in this action, to show by competent witnesses that he had been under the influence of intoxicating liquors for a number of days just prior to the commission of the alleged offense, and was at that time, and had been so at the time, and was at that time, in a condition not to know what he was doing, or to have control of his will, and that he was incapable of forming or executing an intent to commit any crime whatsoever, by reason of his condition at that time from intoxication, and from his general condition from the effects of previous intoxication." This offer was rejected by the Court, upon objection of the state's attorney, made on the ground that, "under the laws of this state, intoxication is no excuse for the commission of a crime, under section 6815, Rev. Codes." It appears elsewhere in the record that defendant's intoxicated condition had extended over a period of not more than six days. It was plainly a case of voluntary intoxication, and not insanity resulting from long-continued and excessive indulgence in intoxicating liquors, which is a condition always distinguishable from voluntary intoxication. The Court's refusal to receive this testimony is assigned as error. The manner of the offer of testimony by the defendant is treated by counsel for the state as sufficient, and it will be so considered, without expressing an opinion upon that point. We feel that we should also disregard the language of the offer, so far as it appears to restrict it to the one purpose of showing incapacity to form an intent, and treat it, as counsel for the state has done, both in his oral argument and brief, as presenting for our determination the

broader question whether, in a larceny case, the defendant has a right to offer evidence to show his intoxicated condition at the time of the commission of the acts, as bearing upon the existence of the element of intent. If such evidence is admissible for that purpose, to aid in establishing a defense to the crime charged, it should not have been excluded because counsel, in his offer, inadvertently indicated as its purpose a result which may be in excess of the legal effect of the evidence proposed to be introduced.

The legislature of this state has by express enactment declared when and for what purpose the intoxicated condition of one on trial for the commission of a crime may be interposed as a defense, and considered by the jury. Section 6815 Rev. Codes, reads as follows: "No act committed by a person while in a state of voluntary intoxication shall be deemed less criminal by reason of his having been in such condition. But whenever the actual existence of any particular purpose, motive or intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the purpose, motive or intent with which he committed the act." The first portion of the section just quoted, which in effect declares that acts which are criminal when done by a sober person are just as criminal when done by one in a state of voluntary intoxication, is merely the adoption by the legislature of the uniform doctrine of the courts that voluntary intoxication is never a justification or excuse for the commission of a crime. It is evident, then, that if the defendant did in fact commit the crime with which he was charged, his intoxicated condition would not avail, either to justify or excuse him. This his counsel very properly concedes. But it is urged that the crime was not committed, that the larceny was not complete without the intent, and that the testimony offered should have been received, and submitted to the jury, to be weighed by them in determining whether or not the necessary intent existed. The statute does not make evidence of intoxication generally admissible and for all purposes. The language used plainly indicates that the legislature had in mind distinct classes of crimes, and intended to limit the admission of such evidence thereto, and for the purpose expressed, namely, to those crimes whose species or degree depend upon the existence of a particular purpose, motive, or intent as an essential element thereof, and for the purpose of determining the intent with which the acts were committed. The admissibility of the evidence of defendant's intoxication in this case depends, then, entirely upon whether larceny comes within this classification. Homicide plainly does. In such a case evidence of intoxication is admitted, never to excuse the homicide, but to assist the jury in finding the presence or absence of the particular intent which marks the particular degree. Likewise in burglary it is admissible, not to justify the acts of breaking and entering, but to throw light upon the additional element, the intent to commit some other crime, which is the particular element nec-

essary to constitute this species of crime. In neither case, nor in any case within the classification made by the statute, is the evidence either admitted or considered for the purpose of justifying or excusing the crime, but for the sole purpose of determining whether in fact, the particular species or degree of crime has been committed.

Are the elements of larceny such as to bring it also within the class of crimes permitting the consideration of evidence of intoxication for the purpose of determining the intent with which the acts are committed? Our answer must be in the affirmative, and our conclusion is that the exclusion of the evidence of defendant's intoxicated condition by the trial court, when considered as offered as a defense to the crime with which he was charged, was error. In reaching this result the fact that larceny is divided into degrees has no weight for its degrees depend wholly upon the value of the property taken. Our conclusion that it is included is based upon the statutory definition of larceny, which makes the intent to deprive another of the property taken a particular and essential element to constitute the crime, without which it does not exist, as well as upon the uniform classification of larceny, by text writers and courts, as a crime requiring a specific or particular intent. 1 Whart. Cr. Law, § § 51-53, 883; 1 McClain, Cr. Law, § 161; Bish. Cr. Law, (4th Ed.) § 490; *Mason* v. *State,* 32 Ark. 238. In *State* v. *Welch,* 21 Minn. 26, the Court said: "In a prosecution for larceny the act of the prisoner, the mere taking, does not constitute the offense, but the act coupled with the intent to steal; and the question is not, did the prisoner intend to take the goods, but, did he take them animo furendi?" In *People* v. *Walker,* 38 Mich. 156, a larceny case, the verdict was set aside for error in charging the jury as follows: "Even if the jury should believe that the defendant was intoxicated to such an extent as to make him unconscious of what he was doing at the time of the commission of the alleged offense, it is no excuse for him, and they should not take it into consideration. A man who voluntarily puts himself in condition to have no control of his actions must be held to intend the consequences." Cooley, J., said: "This charge was given in reliance upon the general principle that drunkenness is no excuse for crime. While it is true that drunkenness cannot excuse crime, it is equally true, that, when a certain intent is a necessary element in a crime, the crime cannot have been committed when the intent did not exist. In larceny the crime does not consist in the wrongful taking of the property, for that might be a mere trespass, but it consists in the wrongful taking with felonious intent; and if the defendant, for any reason whatever, indulged no such intent, the crime has not been committed." In *Chatham* v. *State,* 92 Ala. 47, 9 So. Rep. 607, another larceny case, the Court said: "When the offense consists of an act committed with a particular intent, when a specific intent is of the essence of the crime, drunkenness, as affecting the mental state of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent." *Wood* v. *State,* 34

Ark. 341, also a larceny case, is in full accord with the cases just cited. See, also, *State* v. *Bell,* 29 Iowa 318; *State* v. *Schingen,* 20 Wis. 79;. See, also *Pigman* v. *State,* 14 Ohio 465; *Lytle* v. *State,* 31 Ohio St. 196. The only state, so far as we can ascertain, which has excluded the evidence of a defendant's intoxication in larceny cases, is Indiana. *O'Herrin* v. *State,* 14 Ind. 420, and *Dawson* v. *State,* 16 Ind. 429, are against the admission of such evidence. The later case of *Bailey* v. *State,* 26 Ind. 422, however, held such evidence competent, as tending to show whether the defendant was in a mental condition so as to be able to commit the crime. And still later, in *Rogers* v. *State,* 33 Ind. 543, that Court reversed the lower court for refusing to admit evidence to show that the defendant, who was addicted to the use of opium, had at the time of the offense been deprived of his accustomed supply of the drug, upon the ground that the evidence went to show his mental condition, and bore upon the existence of the intent. This case is cited by *Chatham* v. *State,* 92 Ala. 47, 9 So. Rep. 607, in support of the admissibility of evidence of intoxication in larceny cases. In the latter case the Court said: "When the offense consists of an act committed with a particular intent, when a specific intent is of the essence of the crime, drunkenness, as affecting the mental state and condition of the accused, becomes a proper subject to be considered by the jury in deciding the question of intent. * * * The decided weight of authority sustains the doctrine that evidence of the condition of the accused, though caused by voluntary drunkenness, is receivable, and may be considered by the jury in determining the question of intent." If the property taken is not taken with the intent to deprive another thereof, the crime of larceny has not been committed, and the existence of this intent is always for the jury to determine. There is no degree of intoxicaton, however great, which, of itself, is recognized as rendering one legally incapable of forming a criminal intent. But there may be a mental condition amounting to a species of insanity, superinduced by long and excessive use of intoxicating liquors, which amounts to a legal incapacity to commit crime. In such a case the jury passes upon the existence of that condition, and, if the condition exists wherein the accused is legally irresponsible, the law holds him guiltless of crime.

From an application of a familiar principle that every person is presumed to intend to do that which he does do, and also to intend the natural consequences of his acts, juries very naturally and usually do infer, from the acts entering into the crime of larceny and the manner of their commission, the intent to deprive another of the property taken; but this is by no means a necessary inference, for the intent accompanying the acts may be entirely wanting, or in itself an innocent one. For instance, the property may be taken with an intent to return it, or be taken by mistake, or some intent other than to deprive the owner thereof, in which case larceny has not, of course, been committed. The intent to steal does not follow the

act of taking as a legal and conclusive presumption; and we may add that the act of the legislature, in admitting this class of evidence in particular cases where intent is peculiarly the gist of the crime or degree, is not an arbitrary exercise of power, for it rests on the underlying principle that the ultimate object of judicial inquiry in every criminal prosecution is to determine whether a crime has been committed, and to ascertain the guilt or innocence of the accused. And it would seem to us equally justifiable in principle to prohibit a jury from considering evidence of a defendant's physical condition, where it amounted to partial or complete paralysis of his physical powers, and is offered as bearing upon the question whether the physical acts included in the crime were committed, as to exclude from their consideration his intoxicated condition, as bearing upon the existence in his mind of the intent to steal, in view of the fact that the well-known effect of intoxication upon the mind is to impair the normal condition of the mental machinery in varying degrees, and to produce, in some cases of long-continued and excessive use of intoxicating liquors, such a condition of mind as to amount to legal incapacity. The admission of evidence of intoxication in the cases coming within the statute is solely for the purpose of determining whether, in fact, the species or degree of crime charged has been committed, and should always be so restricted by proper instructions, and never be considered by the jury to justify or excuse crimes which have been committed. For the reasons stated, the order of the District Court is reversed, and a new trial granted. All concur.

(78 N. W. Rep. 981.)

GEORGE STIERLEN *vs.* EMMA STIERLEN.

Opinion filed April 18, 1899.

Appeal Statute Construed.

Section 5215, Comp. Laws, and section 5606, Rev. Codes, construed.

Notice of Appeal Must Be Served and Filed.

Held, that, to take an appeal to this Court from an order or judgment of the District Court, in addition to serving a notice, it is essential that the notice should be filed with the clerk of the District Court within the time limited for taking an appeal.

Purpose of Filing Notice of Appeal.

Held, further, that the following language, "the appeal shall be deemed taken by the serving of the notice," must be construed to refer to both the filing and service, inasmuch as the filing constitutes a service of notice of the appeal upon the clerk.

Omission to File Notice Fatal to Appeal.

Accordingly, *held*, where a notice of appeal from an order was served upon the party within the statutory time for such service, but such

notice was not filed with the clerk of the District Court until after the expiration of the statutory period, that such omission was fatal to the appeal.

Appeal from District Court, Burleigh County; *Winchester*, J.

Action by George Stierlen against Emma Stierlen. From an order vacating judgment for plaintiff, he appeals.

Dismissed.

Boucher, Philbrick & Cochrane (*W. P. Miller*, of counsel), for appellant.

Edward S. Allen and *Eugene F. Burt* (*W. H. Barnett*, of counsel), for respondent.

WALLIN, J. In this action the trial court entered a judgment in plaintiff's favor for a divorce from the bonds of matrimony, on the 17th day of November, 1896. Subsequently, and after notice and a hearing in the trial court, that court entered an order vacating such judgment. Written notice of said order was served on counsel for the plaintiff on March 30, 1898. From the order vacating the judgment, plaintiff has attempted to appeal to this Court. Counsel for plaintiff, with that object in view, and within the time limited by statute, to-wit, on May 12, 1898, served on defendant's counsel a proper notice of appeal from said order; but counsel omitted to file such notice, or any notice of appeal, with the clerk of the District Court for Burleigh county within the statutory period of 60 days, and such notice was not filed with the clerk until July 23, 1898, at which date it was so filed. Upon the filing of said notice, the clerk of the District Court transmitted the record to this Court, and at a term of this Court, held at Fargo on March 28, 1899, the plaintiff, by his counsel, appeared and made application to this Court, under section 5606, Rev. Codes, for the settlement of a statement of the case, to be used in connection with such appeal. This application was opposed upon numerous grounds, none of which are now important, save one, which will be presently considered, and which we deem decisive of the case in this Court for jurisdictional reasons.

Defendant's counsel calls attention to the state of the appeal record, and contends that, inasmuch as no appeal is pending in this Court, this Court is without authority to settle a statement, or take any action whatever in the case. In our opinion, this contention must be sustained. We are of the opinion that the failure to file the notice of appeal with the clerk of the District Court, within the time fixed by statute for taking an appeal from an order of the District Court, is fatal to the appeal. After fixing a time within which the appeal must be taken (Rev. Codes, § 5605), the statute proceeds to point out the particular steps which are essential in taking an appeal to this Court from an order or judgment entered in the District Court. These steps are two in number. Section 5606 is as follows: "An appeal must be taken by serving a notice in writing, signed by the appellant or his attorney, on the adverse party, and filing the same

in the office of the clerk of the court in which the judgment or order appealed from is entered." It will be noticed that this statute nowhere declares that either one of these two prerequisite steps is more important than the other in the process of taking an appeal; nor is there an intimation in the statute that either the service or filing of the notice can be postponed, under any circumstances, to a date beyond the limit fixed by statute for taking an appeal. If the filing may be postponed, we are unable to see any sound reason why the service of the notice should not also be postponed, to meet the exigencies of cases. Questions of practical convenience cannot control the matter; but, if they could do so, we are inclined to think that notice to the clerk of taking an appeal is of as much practical importance as notice to the party. Until the clerk receives notice officially that an appeal is taken, he cannot safely proceed to perform his further duties with respect to the action. The statutory language which we have quoted is an innovation upon the pre-existing practice, made by the Revised Codes. Before being amended, the statute required two distinct services of the notice of appeal,—one, upon the party; the other, upon the clerk of the District Court. See Comp. Laws, § 5215. This Court has held, in accordance with the weight of authority, that under the original statute both services were essential, and one as much as the other. It has been held in Minnesota, however, under a similar statute, that a service upon the clerk could be accomplished by a mere filing of the notice with him, with proof of service upon the party. This ruling is tantamount to saying that the mere filing with the clerk was, in effect, a service upon the clerk. See *State* v. *Klitzke,* 46 Minn. 343, 49 N. W. Rep. 54.

It is manifestly true that filing the notice of appeal with the clerk does practically operate to give that officer notice of the appeal. Keeping this fact in view, it is easily seen that the purpose of the amendment was not to do away with notice to the clerk, but was, on the contrary, to simplify the manner of such notice, and make it less cumbersome. The filing is a simple operation, and yet one which is equally effectual as notice with that of double service. It is clear to us, from the very wording of the amended part of the section, that such was the purpose of the legislature in amending the statute. It was to simplify notice to the clerk, and was not to abolish it altogether. The notice to the officer whose duty it is to send up the record is still essential, and as much so under the new statute as it was under the old. But, by some inadvertence, the remaining parts of the original section (Comp. Laws, § 5215) were left standing, and thereby an ambiguity is created in the section as it now reads. Between the new and the old parts of section 5606, Rev. Codes, there is at least an apparent conflict, in this: The amended part clearly declares that both a service and filing are essential to an appeal, while the remaining part of the section, not amended, declares that "the appeal shall be deemed taken by the service of a notice of the appeal," and in this immediate connection

there is no reference made to the vital matter of filing the notice with the clerk. Technically construed, there is a conflict between the two parts of the amended section; the former part making two acts essential to an appeal, while the latter seemingly requires but one. But, in view of the obvious legislative purpose in amending the statute, we deem it to be our duty to construe the word "service," as found in the line of the statute last above quoted, as equivalent in meaning to the words "service and filing." So construed, the language of the entire statute can be given effect, and, in our opinion, the purpose of the legislature is thereby fully accomplished. The word "service," last quoted, has a clear meaning as it stood in the original statute. It referred to service both upon the party and upon the clerk, and we think it should be given a similar meaning as it now stands. We construe the word "service" broadly, as meaning giving notice, not merely to the party, but to the clerk as well.

Without further discussion, we will only add that we give a similar construction to the curative feature of the statute, as found in section 5625, Rev. Codes. We hold that the words "service of the notice of appeal," as used in that section, had reference to both the service and filing required in the same section of the amended statute. Moreover, we know of no action which this Court could take, under the provisions of the section last cited, which could give effect to this appeal. No order of court could overcome the stubborn fact that one of the prerequisites of the appeal is lacking in this case. One step, which we hold to be essential to the appeal, was not taken in time. In *Baker* v. *Eyres,* 32 Pac. Rep. 1073, the Supreme Court of the State of Washington, under a similar statute, and where both the service and filing took place within the statutory limit, but the latter did not occur until 60 days after the former, held that the filing was unreasonably postponed, and was too late to effect an appeal. This is much further than we are required to go in this case. It is elementary that a statute which limits the time for an appeal is mandatory and jurisdictional, and therefore must be strictly construed, and where an appeal has not been taken within the statutory period the court of review is without power to do more than dismiss the appeal; nor can this statutory time be extended by the courts, unless the power to do so is expressly given in the statute. These rules are so firmly established that we deem it unnecessary to fortify them by citations of cases, and hence we refer only to 2 Enc. Pl. & Prac., p. 239 et seq., where the rule is stated and the authorities sustaining the same are collected. The appeal must be dismissed, for further proceedings in the court below. All the judges concurring.

(78 N. W. Rep. 990.)

STATE *v's.* C. N. HOGAN.

Opinion filed May 5, 1899.

Insurance Agent—Certificate of Authority.

A violation of the provisions of section 3124, Rev. Codes, forbidding any agent to act for any insurance company in transacting the business of insurance without procuring a certificate of authority as therein specified, is a crime under the laws of this state.

What Constitutes an Insurance Company.

A corporation which undertakes to guaranty a fixed revenue per acre from farming lands, and which, in order to do so, contracts, for a specified consideration, to pay such fixed amount per acre for the crop grown upon said land, irrespective of its value, is an insurance company within the provisions of sections 4441, 4445, Rev. Codes.

C. N. Hogan being in the custody of J. G. McKecknie, sheriff of Foster county, upon a commitment issued after a preliminary examination by a committing magistrate of said county, petitioned for a writ of habeas corpus, alleging that he is illegally restrained. The defendant demurred to the petition. The allegations of the petition appear in the Court's opinion.

Writ denied.

W. E. Purcell, P. J. McCumber, Charles E. Wolfe, and *Stevens & Allen,* for petitioner.

John F. Cowan, Attorney General, and *George W. Soliday,* State's Attorney, for the State.

BARTHOLOMEW, C. J. One C. N. Hogan presented to this Court his petition for a writ of habeas corpus, alleging that he was unlawfully restrained of his liberty by the sheriff of Foster county, in this state. His petition sets forth that he was arrested upon a warrant issued by a justice of the peace of said county, which said warrant was based upon a complaint duly laid before said justice by one Ferguson, wherein said petitioner was accused of having acted as agent for an insurance company without having procured the certificate required by section 3124 Rev. Codes of this state, that a preliminary hearing was duly had before said justice, and that upon such hearing said justice adjudged that the petitioner be held to answer to said charge before the District Court of said county, and fixed his appearance bond at the sum of $500, which the petitioner failed to give, whereupon he was duly committed to the custody of said sheriff, and was by him restrained. Copies of the complaint, the warrant, of all the testimony introduced at the hearing, of the entries in the docket of the justice and of the mittimus were attached to, and made a part of, the petition. The writ was duly issued by this Court, directed to said sheriff, who

in due time made return thereto setting forth the grounds upon which he restrained the petitioner, which were substantially in all respects as shown in the petition. To this return the petitioner demurred, and upon the issues of law thus raised the case was argued to this Court.

The petitioner contends (1) that a violation of the provisions of said section 3124 does not constitute a crime, under the laws of this state, and, (2) granting that such violation does constitute a crime, there is no reasonable or probable cause to believe that petitioner has committed such crime We notice the points in this order.

Section 3124, Rev. Codes, declares: "No agent shall act for any insurance company directly or indirectly in taking risks or transacting business of insurance without procuring from the commissioner of insurance a certificate of authority, stating that such corporation or company has complied with all the requisites of this chapter. Section 3131, being a part of the same chapter, declares: "For violation of any provision of this chapter when no penalty is specifically provided for herein the offender shall be punished by a fine of not less than one hundred dollars nor more than five hundred dollars." We notice here that the fine imposed is declared to be by way of punishment, and a large discretion is vested in the court in fixing the amount. No part of the amount inures to the benefit of any private person. No person is authorized to sue for or recover it. It is not a case where the law arbitrarily fixes a penalty as the liquidated damages for failure to perform an ascertained legal duty owing to another, and which penalty the party to whom the duty was owing may recover in a personal action upon proof of the dereliction. But petitioner urges that this penalty should be recovered by the state under the provisions of chapter 27, Code Civ. Proc., which relates to actions to recover penalties and forfeitures. But the first section of that chapter (section 5785) provides that, if the act for which the forfeiture was imposed is a misdemeanor, then such forfeiture cannot be recovered in a civil action. We look then to the Penal Code to determine whether or not this act is a misdemeanor. Section 6802 reads: "A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, either of the following punishments: * * *" And the third punishment named is "fine." We have then, in this case, a statute (section 3124) forbidding the doing of a certain act, we have that forbidden act done, and the punishment which the law (section 3131) prescribes for doing this forbidden act is a fine; hence it must be a crime. Section 6803 declares that crimes are divided into felonies and misdemeanors. Section 6804 reads: "A felony is a crime which is or may be punishable with death or imprisonment in the penitentiary; every other crime is a misdemeanor." We have here, then, a crime. It cannot be punished by death or imprisonment; hence it must be a misdemeanor. It seems clear to us that petitioner's first contention cannot prevail. In saying that this offense cannot be

punished by imprisonment, we mean only that primarily the judgment must be a fine, and the judgment may be satisfied by the payment of the fine; but we do not hold that the judgment may not also direct that, in case of nonpayment, the defendant be imprisoned as provided in section 8295, Rev. Codes.

Petitioner's second proposition presents more difficulties, and, as preparatory to its discussion, we remark that no point is made by petitioner as to the regularity of any of the proceedings that led up to his incarceration. They are concededly regular. It is admitted, also, that petitioner was soliciting business as agent for a corporation known as the Realty Revenue Guaranty Company, of Minneapolis, Minn. It is admitted that petitioner never procured the certificate of authority specified in said section 3124, and that he took an application from the complaining witness in form as set forth in the evidence, and procured for said witness the contract of said company as set out in the evidence, and took the promissory note of the witness, secured by chattel mortgage, for the consideration mentioned in said contract. These admissions leave but one question for our determination: Is or is not the Realty Revenue Guaranty Company, in fact or in effect, an insurance company? If it be, then clearly the petitioner was properly held; otherwise, he should be discharged. While the attorneys representing the state claim that the oral evidence in the record strengthens their claim that said corporation is in fact an insurance company, yet we shall rest our conclusions on this point upon the documentary evidence. Our statute (section 4441, Rev. Codes) defines insurance as follows: "Insurance is a contract whereby one undertakes to indemnify another against loss, damage or liability arising from an unknown or contingent event." Necessarily, in defining insurance in a single sentence, only the most general terms can be used, and any general definition must be extended to cover the ever-changing phases in which the subject is presented to the public. Fifty years ago it was thought that a single chapter in any work on contracts could exhaust the law of insurance. Now Mr. Joyce presents the subject in four elaborate volumes, showing the immense development of that branch of the law. Mr. Joyce expressly defines one line of insurance as guaranty insurance. See 1 Joyce, Ins. § § 12, 13. True, guaranty insurance, as there defined, relates more particularly to guaranty against loss by reason of breaches of contract, such as "fidelity guaranty" and "credit guaranty." But we have real estate title guaranty insurance; and, while perhaps this is the first instance where an attempt has been made to guaranty a realty revenue, yet as the revenue arising from that class of realty here involved, *i. e.* farming lands, is affected by so many contingencies, such as winds, hail, frost, drought, ravages of insects, etc.,—contingencies which, while not likely to happen, yet such as may occur,—it would seem that inherently it would be a proper subject for insurance, perhaps even an inviting field. In this record we find a copy of the articles of incorporation of the Realty Revenue Guranty Company. The

second article sets forth the general business of the corporation, naming a number of things that it is organized for the purpose of doing, and, among others, "to guaranty certain rental and produce income from lands and tenements." The petitioner, as agent for said company, took from Peter Ferguson an application for a contract. The application was upon a printed form, headed, in bold type, "Realty Revenue Guaranty Company, of Minneapolis, Minn. Capital stock $100,000." Then follows the printed portion, which reads: "I, ———, of —— P. O., county of ——, state of ——, do hereby apply to the Realty Revenue Guaranty Company for an option-sale contract of $—— per acre, which is hereby referred to and made a part hereof, subject to all conditions therein contained upon all crops raised on the following described lands." Then follows a description of land, and various questions to be answered by the applicant as to whether he is owner or tenant of the land, and what interest he has in the crop, what the land yielded per acre the year before, nature of the soil, etc.,—all to be signed by the applicant. Upon this application, Ferguson received a contract, which we copy in full: "This agreement, made by and between the Realty Revenue Guaranty Company, of Minneapolis, Minnesota, and Peter Ferguson, of Carrington P. O., County of Foster, and State of North Dakota, party of the second part, witnesseth that, in consideration of an application for this contract, which is hereby referred to and made a part hereof, and the payment of the sum of $55, according to the conditions of a certain promissory note for said amount, by said party of the second part, the above named Realty Revenue Guaranty Company agrees to purchase the entire crop of small grain, consisting of wheat, oats, flax, barley, corn, or rye, from said party of the second part, at the rate of $5.00 per acre, grown during the season of 1899; all of said crops being on the following described lands, to-wit: 160 acres southeast quarter of Sec. 20, T. 146, R. 65; 60 acres northwest quarter Sec. 26, T. 146, R. 65. It is further agreed that said party of the second part is in no manner bound to sell said crops to the said Realty Revenue Guaranty Company, except at his own option. It is further agreed that said party of the second part shall cultivate said crops in a husbandlike manner, sow, plant, garner, gather, harvest, thresh, and otherwise care for said crops in due season and in an economical manner. Said party of the second part agrees to notify said Realty Revenue Guaranty Company in case of any damage to said crops within five days thereafter, and of his intention to avail himself of his option to sell before said crops are harvested, and shall, within five days after threshing the same, give notice to the company of his election to sell under this contract After said election to sell, said party of the second part agrees to deliver said crops at the nearest market, if directed so to do by said Realty Revenue Guaranty Company. Should the party of the second part fail to perform any of the conditions herein by him to be performed, time being the essence hereof, or if any of the warranties or statements made by him are untrue,

the said option shall terminate. Nor shall said guaranty company be liable under this contract should any damage or loss accrue to said crops after September 15 of this year, or after said crops are harvested, nor in any manner, except as herein stipulated. This contract shall terminate December 1st following date hereof. In witness whereof, the said Realty Revenue Guaranty Company has caused these presents to be executed and signed by its president and secretary, and caused its corporate seal to be hereto attached, this seventh day of April, 1899. Realty Revenue Guaranty Co., by L. E. Utley, President. A. L. Brice, Secretary. [Corporate Seal.]"

What was the object of this contract and what was its legal effect? The petitioner says it was an option contract of sale of a crop. We cannot conceive that the farmer's primary object was to sell his crop. Ordinarily a man does not pay a premium for the privilege of selling his produce. Nor was it the primary purpose of the company to purchase the crop. From the very terms of the contract, it is certain that it must lose money upon all the grain it buys under the contract. Moreover, grain is bought and sold by the bushel, and not by the acre. We think the contract was the identical contract which the articles of incorporation authorize the company to enter into. It was a contract by which the guarantor undertook to guaranty or assure to the farmer a certain revenue from his land. How did the parties proceed to execute such a contract? It was well known to both parties that an acre of land in this state, farmed as the farmer contracts to farm it in this case, will produce a crop of a value far in excess of five dollars, and the value can be reduced to or below that figure only by the happening of one or more of the contingencies hereinbefore mentioned. But such contingencies may happen, and to be absolutely assured that his land will yield him at least five dollars per acre the farmer is willing to pay something; and the corporation, expecting to do business over a wide scope of country, believes that it can with profit to itself assure the farmer a crop worth five dollars per acre for the compensation which the farmer is willing to pay therefor. But what is this in substance except a contract to indemnify the farmer against loss arising from the happening of a contingent event, and that is our statutory definition of insurance. The farmer was seeking and paying for protection, and the corporation was seeking to make a profit by extending this protection for the consideration paid by the farmer. True, it is not all loss that is insured against. The contingencies named may reduce the value of a crop from twenty dollars per acre until, in the judgment of the owner, it barely exceeds five dollars per acre, and there is no liability under the contract. It is the loss below five dollars per acre that is insured against. The effect of the contract is very like that of a valued policy of insurance. When the contingency happens that creates a liability under the policy, then the full amount of the policy must be paid, but the insured is entitled to all the salvage.

In *Claflin* v. *System Co.*, 165 Mass. 501, 43 N. E. Rep. 293, the defendant was held to be an insurance company. The contract is thus stated by the Court: "It was made on April 6, 1891, and purports to bind the defendant, in consideration of a sum paid, to purchase at a fixed price the accounts which during one year a certain business firm should have against ascertained insolvent debtors, or judgment debtors against whom execution should be returned unsatisfied." A contract to purchase bad accounts and judgments at a fixed price, irrespective of value, cannot be distinguished in principle from a contract to purchase damaged crops at a fixed price, irrespective of value. That same company was held to be an insurance company in *Shakman* v. *Same*, 92 Wis. 366, 66 N. W. Rep. 528, and the resoning of the Court is very pertinent to this case.

It is doubtless true that there has been a studied effort to keep this corporation outside the operation of our insurance laws; but the purpose and effects of its contracts are too clear to admit of doubt. They exactly meet the requirements of an insurance contract, and the corporation for which petitioner acted as agent is an insurance company. The act charged in the complaint is a crime under our statutes, and there is reasonable and probable cause to believe the petitioner guilty of committing the act. He is therefore properly held.

The writ issued in this case is discharged, and petitioner remanded to the custody of the sheriff of Foster county. All concur.

(58 N. W. Rep. 1051.)

Note—Habeas Corpus case must be brought in the name of the state. Carruth v. Taylor, 8 N. D. 166.

AASE BOYUM *vs.* OLE A. JOHNSON, *et al.*

Opinion filed May 4, 1899.

Vendor and Purchaser—Construction of Contract.

In a contract of sale of real property it was provided that payment should be made by delivering to the vendor, in an elevator, the one-half of all grain raised on the premises each year, and that until such delivery the title to the entire crop should remain in the vendor. *Held*, nevertheless, that while the contract remained in force the vendee was entitled to the possession of said crop for the purpose of threshing and preparing it for delivery as specified in the contract.

Default—Waiver.

Where, in such a contract, it was provided that default in the performance of any of the covenants therein contained should, at the election of the vendor, render such contract void, and there was a default in the covenant to pay taxes, and after such default the vendee, with the knowledge of the vendor, proceeded to expend labor and money in planting and producing a crop upon said land, *held* that, after such crop was produced, it was too late for the vendor for the first time to give notice of his election to declare

the contract void by reason of such default, and thereby secure the entire crop. Under such circumstances the law conclusively presumes that the default was waived.

Appeal from District Court, Sargent County; *Lauder*, J.

Action by Aase Boyum against Ole A. Johnson and others for the conversion of certain grain to which plaintiff claimed title under a farm contract. Judgment for defendants, and plaintiff appeals. Affirmed.

Morrill & Engerud, for appellant.

Plaintiff was the absolute owner of the crops on the land in question, subject to Dahlen's right of possession under the terms of the contract. *Angell* v. *Egger*, 6 N. D. 391. Dahlen failed to pay the taxes for 1894 and 1895, and expressed a determination to abandon the contract. Plaintiff terminated the contract for this default. The defendants' act, therefore, in threshing the grain was a conversion. Bigelow, Leading Cases in Tort, 444, 26 Am. & Eng. Enc. L. 733, 734, notes 4 a-b; 5 Am. & Eng. Enc. L. (1st Ed.) 528, Sec. 2; *Bristol* v. *Burt*, 7 Johns, 254; *Connah* v. *Hale*, 23 Wend. 462. Every person who aids a wrong doer in the act of conversion is jointly liable with him. 2 Hillard on Torts, 243; *Barmer* v. *Schlessinger*, 76 N. W. Rep. 116; *Osborne* v. *Plano Mfg. Co.*, 70 N. W. Rep. 1124. The defendants, as wrongdoers, have no concern with existing equities between plaintiff and Dahlen. *Adamson* v. *Peterson*, 24 N. W. Rep. 321, 26 Am. & Eng. Enc. L. 819.

S. M. Lockerby and *P. H. Rourke*, for respondents.

Plaintiff waived a forfeiture for nonpayment of taxes. No notice was given defendant of an election by plaintiff to declare the contract void. To have availed appellant he should have acted with diligence and make his election at the time the default took place. *Haugen* v. *Kerr*, 68 N. W. Rep. 695; *Basse* v. *Galager*, 7 Wis. 448; *O'Connor* v. *Hughes*, 35 Minn. 446, 29 N. W. Rep. 152; *Cole* v. *Shepard*, 30 Minn. 446, 16 N. W. Rep. 153.

BARTHOLOMEW, C. J. Plaintiff brought this action against the defendants as co-partners, and sought to recover the value of certain grain of which she claimed she was the owner in possession, and which the defendants wrongfully took and converted to their own use. The answer was in denial, and on the trial the defendants had a directed verdict in their favor. The judgment rendered on the verdict must be affirmed. In 1893 the plaintiff sold to the defendant Dahlen a certain tract of land in Sargent county, in this state. The contract provided that the purchase price should be paid by delivering one-half of the crop raised upon the land in each year at a certain elevator in the vendor's name, which should be sold by the vendor, and the proceeds applied to such payment. The vendee covenanted to farm the land in proper manner, to raise not less than a specified number of acres of grain each year,

and to pay all taxes assessed upon the premises before the same should become delinquent. The grain was to be delivered at the elevator within a reasonable time after threshing, and it was stipulated that, until one-half of the grain should be so delivered, the title to the whole should remain in the vendor. It was also provided that, in case of default in the performance of any of the covenants contained therein, the agreement should be void at the election of the vendor, and the vendee would, on demand, surrender possession, etc. The grain in question was raised by Dahlen on the premises in the year 1896. It is not claimed that up to that time there had been any default in the delivery of grain, but the taxes for 1894 and 1895 had not been paid. To that extent a default existed, but plaintiff had never given the vendee any notice of her election to declare the contract void by reason of such default, nor had she ever demanded the possession of the premises. During the harvest of 1896 something was said on various occasions by the vendee, in conversation with plaintiff's agent, about throwing up the contract, and taking a lease for the next year; but we do not understand that any claim is made that there was an actual surrender of the contract. But, be that as it may, it would not alter the rights of the parties to the crop of 1896. The defendant Dahlen, who was the vendee under the contract, was also interested with his co-defendants in the ownership of a certain threshing machine. This machine was brought upon the premises in the fall of 1896 to thresh the crop. Plaintiff appeared, by her agent, before the threshing was begun, and forbade the parties in charge from threshing the grain. This order was disregarded, and the grain was threshed, and it is this act of threshing the grain against her wishes and commands that plaintiff claims constitutes conversion. There was no conversion. Treating the contract as in force, at least for the purpose of disposing of the crop of 1896, notwithstanding the fact that under the contract the title to the crop was in plaintiff, the vendee, Dahlen, had the right to the possession of the crop in order to thresh and prepare it for delivery at the elevator. To hold otherwise would be to hold that the vendor had it in her absolute power at any time to force a default on the part of the vendee. Dahlen, having a right of possession, had a right to say what machine should or should not be used in threshing the grain; otherwise, the same result would follow. If the contract was in force, there could be no conversion But it is urged that the vendee was in default in the matter of taxes. But such default had been clearly waived. It occurred long before. No action whatever had been taken thereon. It was not competent for the vendor to sit by after the default, and see the vendee expending his time and money in producing a crop, and, after the crop was produced, to step forward, and undertake to take advantage of such default, and deprive him of what he had produced, relying upon a waiver of the default. He who would take advantage of such a default must act promptly, and must not permit the other party to expend

money and labor relying upon the existence of the contract. *Fargusson* v. *Talcott,* 7 N. D. 183, 73 N. W. Rep. 207; *Coles* v. *Shepard,* 30 Minn. 446, 16 N. W. Rep. 153; *O'Connor* v. *Hughes,* 35 Minn. 446, 29 N. W. Rep. 152. In the case at bar the vendor never at any time or in any manner notified the vendee of her election to declare the contract void, and by the express terms of the contract such an election was necessary to terminate the contract. The contract being in force, Dahlen's right of possession must be upheld; hence those who acted under his instructions in threshing the grain could not have been guilty of conversion.

Something was said in the trial court about a right to possession in the vendor under a seed lien, but we understand that to be abandoned in this court as untenable. The judgment of the district court is affirmed. All concur.

(79 N. W. Rep. 149.)

CHARLES B. HILL *vs.* CHARLES E. WILSON.

Opinion filed May 4, 1899.

Pleading—Damages for Wrongful Detention of Personalty.

In an action to recover a gross sum for value of the use of a hack and team wrongfully detained by the defendant, and for a fixed period, it is not necessary to plead specially unusual conditions, which make the value of the use greater upon some days than others, to render evidence of such greater value admissible, when the conditions are equally within the knowledge of both parties.

Evidence of the Value of Use of Property.

Evidence as to the value of the use of personal property upon particular occasions which create an unusual demand for that kind of property is not subject to the objection that it is speculative, when the evidence is based upon known conditions of demand and value existing at the time.

Appeal from District Court, Cass County; *Pollock,* J.

Action by Charles B. Hill against Charles E. Wilson. Judgment for plaintiff. Defendant appeals.

Affirmed.

Morrill & Engerud, for appellant.

W. H. Barnett, for respondent.

YOUNG, J. This action originated in Justice Court in Cass county upon these facts: On June 10, 1898, the defendant, as sheriff of that county, seized certain personal property belonging to the plaintiff, consisting of a hack, team, harness, etc., under an execution issued out of the District Court upon a judgment against one John Keating. The defendant refused to surrender the property to plaintiff pursuant to his demand made the day after the seizure. Neither did he release it promptly when a sheriff's jury returned a finding

that the property belonged to the plaintiff, but continued to retain it for several days. This action is brought to recover the value of the use of the property for the time intervening between the seizure and release. The complaint alleges the value of the use to have been $75. The justice gave judgment for $34.50, and in his record, just preceding the judgment proper, he recites that he finds "the plaintiff is entitled to recover of defendant the sum of two and 50-100 dollars for nine days, and the further sum of twelve dollars for June 17th." This recital merely shows this estimate of the value of the use upon different days, taken as a basis for the gross judgment. There is no controversy in this case over the proper measure of damages. It is conceded that it is the value of the use of the property. Over defendant's objection, plaintiff was permitted to introduce evidence showing that the use of this property was of greater value on June 17th—one of the 10 days it was detained—than on the other days; also to show, as conditions causing the difference, that there was a circus in town on that day. Counsel for defendant properly saved exceptions to the admission of this evidence, and appealed to the District Court upon errors of law alone. It was there urged that the evidence was not admissible—First, because special damages for this particular day were not pleaded; second, for the reason that the evidence as to damages was entirely speculative. The District Court affirmed the judgment of the justice. The case now comes to us upon the same points urged below.

Upon both points appellant must fail. The plaintiff sought to recover simply for the use of the property. The only question at issue was what the value was. The complaint sufficiently informed defendant of plaintiff's demand, and particularly specified the exact period of time for which a recovery was demanded. It does not follow that, because the use of the property was more valuable one day than another, such fact, and the reasons therefor, must be specially pleaded. What the value actually was became an issue of fact to be determined as any other question of fact. It is patent that the value of the use of such property depends upon conditions existing from day to day and week to week. Evidence that on this particular day there was an unusual demand for hacks because it was circus day only goes to show conditions which support the evidence of the witnesses that the value of the use of the property was approximately the amount named by them, which was much in excess of ordinary days. Neither is the evidence of value speculative. It is not based upon prospective profits which plaintiff might have made by running the hack, but upon the actual value of the use of the property under conditions which were known to both parties. The judgment of the District Court is affirmed. All concur.

(79 N. W. Rep. 150.)

BURGETT KINNEBERG *vs.* OLE KINNEBERG.

Opinion filed May 4, 1899.

New Trial—Misconduct of Jury.

Where a party to an action has knowledge of misconduct of the jury, and does not avail himself of it at the earliest opportunity, he is deemed to have waived his right to urge such misconduct as a ground for a new trial.

Proof Necessary for New Trial Because of Misconduct of Jury.

A motion for a new trial, based upon the misconduct of the jury, must be accompanied by an affirmative showing that such misconduct was unknown to the moving party before the final submission of the case to the jury; and, in the absence of such showing, such misconduct cannot be considered.

Proof of General Reputation for Chastity.

The defendant is charged with an assault with intent to commit rape, in a civil action to recover damages therefor. *Held*, that evidence offered by him as to his general reputation for chastity was properly excluded upon the ground that his general reputation for chastity was not involved in the specific acts charged, and that the case was properly determined upon its own facts and circumstances, which are held here as sufficient to sustain the verdict for plaintiff upon this cause of action.

Evidence Insufficient to Justify Verdict.

Evidence in support of a verdict returned for plaintiff for alleged alienation of affections, upon a separate cause of action, examined, and *held* insufficient to sustain the verdict.

Appeal from District Court, Nelson County; *Fisk*, J.

Action by Burgett Kinneberg against Ole Kinneberg. Judgment for plaintiff, and both parties appeal.

Affirmed.

Frank B. Feetham, for plaintiff and appellant.

Plaintiff's objection to defendant's offer of proof was properly sustained. Best on Evidence, § 506. "Where a tender of evidence is made to prove certain facts, some of which are admissible and others inadmissible the offer is properly rejected. The Court is not bound to separate it and admit such parts as are competent." Thompson on Trials, § 678; *Smith* v. *Arsenall Bank*, 104 Pa. St. 518; *Holsey* v. *Black*, 28 N. Y. 444; *First National Bank* v. *North*, 2 S. D. 80, 51 N. W. Rep. 98. The Court was not bound to do more than respond to the motion in the terms in which it was made. *Elliott* v. *The Lessee*, 1 Peters 336, 7 L. Ed. 169. It is not competent for a party to a civil action, whose reputation has not been attacked, to offer testimony proving his good character. 5 Am. & Eng. Enc. L. (2d Ed.) 863; *Brown* v. *Evans*, 17 Fed. Rep. 912; *Anthony* v. *Grand*, 101 Cal. 235; *Vance* v. *Richardson*, 42 Pac. Rep. 909; *Elliott* v. *Russell*, 92 Ind. 526; *Redden* v.

Gates, 2 N. W. Rep. 1079; *Day* v. *Ross*, 154 Mass. 13; *Fahey* v. *Crotty*, 29 N. W. Rep. 876; *Porter* v. *Seiler*, 62 Am. Dec. 341. Defendant can not in a civil action for bastardy prove his good reputation for virtue and chastity. *Stoppert* v. *Nierle*, 63 N. W. Rep. 384; *Sayen* v. *Ryan*, 9 Ohio Ct. Rep. 631; *Walker* v. *State*, 6 Blackf. 1; *Houser* v. *State*, 93 Ind. 228; 3 Am. & Eng. Enc. L. (2d Ed.) 884. Evidence of good character of a defendant in a civil action is not admissible, even though the complaint states in law a criminal offense, and even though on the trial of a criminal charge for the same offense the evidence would be pertinent. *Young* v. *Sheppard*, 40 S. W. Rep. 62; *Barton* v. *Thompson*, 9 N. W. Rep. 899; *Klien* v. *Bayer*, 45 N. W. Rep. 991; *Boick* v. *Bissell*, 45 N. W. Rep. 55; *Williams* v. *Edmunds*, 42 N. W. Rep. 534. There is no showing that defendant was not aware of the alleged irregularity in the conduct of the jury at the time it occurred. *Grottkau* v. *State*, 36 N. W. Rep. 32; *State* v. *Tuller*, 34 Conn. 294; *Foedisch* v. *Chicago*, 69 N. W. Rep. 1055; *Territory* v. *O'Hare*, 1 N. D. 30; *Stampofski* v. *Steffins*, 79 Ill. 303; *Berry* v. *DeWitt*, 27 Fed. Rep. 723. Before the defendant can ask that the verdict be vacated on this ground, he must show that neither he or his counsel had any knowledge of the irregularity complained of prior to the submission of the case to the jury. *Fifth Avenue Bank* v. *Cooper*, 48 N. E. Rep. 236; *Wynn* v. *City*, 17 S. E. Rep. 650; *Gottkau* v. *State*, 36 N. W. Rep. 32; *Steward* v. *Hinkel*, 13 Pac. Rep. 495; *Woodruff* v. *Richardson*, 20 Conn. 241; *Parks* v. *State*, 4 O. St. 235; *Wooters* v. *Craddock*, 46 S. W. Rep. 916; *Eastman* v. *Wight*, 4 O. St. 158; *Brown* v. *LaCrosse*, 21 Wis. 56; *Stewart* v. *Ewbank*, 3 Iowa 191; *Mergentheim* v. *State*, 8 N. E. Rep. 570; *Rollins* v. *Ames*, 9 Am. Dec. 79. It does not appear that the plaintiff was in any way connected with the irregularities of the jury or that she was aware of the same. Where the interference of strangers with the jury is unattended with corruption in the latter and has not been permitted by a party, an injustice has not been done and the verdict will not be disturbed. *State* v. *Cucuel*, 31 N. J. L. 262; *State* v. *Woodson*, 41 Iowa 425; *Kennedy* v. *Holliday*, 16 S. W. Rep. 688; *Fuller* v. *Fletcher*, 44 Fed. Rep. 34; *Stewart* v. *Ewbank*, 3 Iowa 191; *Price* v. *Lambert*, 3 N. J. L. 123; *People* v. *Boggs*, 20 Cal. 432; *Steward* v. *Hinkel*, 13 Pac. Rep. 495. The claim that the verdict is without support in the evidence is without merit. *Taylor* v. *Jones*, 3 N. D. 235, 55 N. W. Rep. 593; *Fuller* v. *Elevator Co.*, 50 N. W. Rep. 359; *Brown* v. *Evans*, 17 Fed. Rep. 912.

John A. Sorley (*Bosard & Bosard* of counsel), for defendant and appellant.

Remarks made in the presence of a jury by outsiders intended to prejudice the jury against a party, against whom the jury afterwards return a verdict, is ground for a new trial. *Smith* v. *Mellinghan*, 44 Ga. 200; *People* v. *Brannigan*, 21 Cal. 340; *People* v. *Turner*, 39 Cal. 375; *Pettibone* v. *Phelps*, 13 Conn. 445. If an offer of

proof is good in part, an objection to the whole offer can not be sustained. *Board of Education* v. *Keenan,* 55 Cal. 647; *Curtis* v. *Moore,* 20 Md. 96; *Buffington* v. *Cook,* 39 Ala. 64; *Lick* v. *Diaz,* 37 Cal. 446. It was error for the Court to reject evidence of defendant's reputation for chastity. *Heine* v. *Commonwealth,* 91 Pa. St. 145; *Hauney* v. *Commonwealth,* 116 Pa. St. 327; *Commonwealth* v. *Hardy,* 2 Mass. 317; *Caldwell* v. *State,* 17 Conn. 467; *Carroll* v. *State,* 60 Am. St. Rep. 567; *State* v. *King,* 9 S. D. 628, 70 N. W. Rep. 1046.

YOUNG, J. In this action the plaintiff seeks to recover damages for wrongs alleged to have been suffered by her at the hands of the defendant, who is her father-in-law. The complaint originally contained three separate causes of action. The first charges an assault with attempt to rape, committed July 12, 1894, the second sets out a repetition of the same offense occurring some eight days later, and the third charges the defendant with alienating the affections of her husband. The case was tried to a jury. After the plaintiff had rested her case the second cause of action was stricken out by consent of counsel, as being without evidence to sustain it. The jury returned a verdict for the plaintiff on both remaining causes of action, assessing her damages on the first at $500, and on the third at $1,500. The defendant made a motion for a new trial, which was granted as to the third cause of action, but was refused as to the first. Both parties appeal.

We will first consider the defendant's appeal from the order refusing to vacate the verdict rendered on the first cause of action. The motion for a new trial was made upon a settled statement of the case, which was used as a basis for both appeals. Three particulars pertinent to his appeal are urged by defendant's counsel in support of his contention that the Court's refusal to grant a new trial on the first cause of action was error: First, misconduct of the jury; second, insufficiency of the evidence to justify the verdict; third, the rejection of evidence as to defendant's chastity. These will be taken up in the above order.

The misconduct of the jury of which complaint is made is set out in the statement in the form of three affidavits made by third persons, stating that certain statements relative to the defendant were made by two of the jurors on the regular panel, either to or in the presence of two of the jurors sitting on the case, and before its final submission to them. These statements, it is urged, were made for the purpose of influencing a verdict against the defendant, and were in fact prejudical. We may state that the communications were reprehensible, and possibly of such a nature as to subject the parties making them to punishment for contempt. But, in the condition of the record, we are not at liberty to give any weight to this ground of defendant's motion, for no showing whatever is made, by affidavit or otherwise, that this alleged misconduct was not known to the defendant before the final submission of the case to the jury,

when it might have been corrected or cured. It is a well-settled and wholesome rule of practice that a motion for a new trial based upon the misconduct of the jury must be accompanied by an affirmative showing that such misconduct was unknown to the moving party before the final submission of the case. This rule proceeds upon the principle that one who has knowledge of facts which would vitiate the verdict should bring such facts to the attention of the Court at the earliest possible moment, to the end that the fault may be corrected, and, if this is not done, he is deemed to have waived the right to object; or, as sometimes expressed, he is not permitted to conceal the knowledge of the facts, and take the chance of the verdict being favorable to him, and then, if unfavorable, have it set aside upon grounds which he has concealed. 12 Enc. Pl. & Prac. 558, and cases cited; also, *Grottkau* v. *State* (Wis.) 36 N. W. Rep. 31; *Wooters* v. *Craddock* (Tex. Civ. App.) 46 S. W. Rep. 916; *Bank* v. *Cooper* (Ind. App.) 48 N. E. Rep. 236. This showing of lack of knowledge is easily made, if such is the fact.

Neither does our examination of the record give us any reason for reversing the order refusing a new trial upon the ground that the evidence is insufficient to justify the verdict. The only direct evidence in this cause of action is that of the parties themselves. The plaintiff testified positively to the acts constituting the assault. These were unequivocally denied by the defendant. There are circumstances surrounding and immediately connected with the alleged acts which cast some discredit upon the plaintiff's testimony, but not sufficient to enable us to say that the verdict is not supported by the evidence.

One of defendant's witnesses was asked this question: "Do you know what his (defendant's) reputation for chastity is?" The witness was not permitted to answer, and evidence of defendant's chastity was excluded. In so ruling the Court did not err. The civil cases wherein a defendant may introduce evidence of his reputation are very few in number, and are exceptional cases, in which the defendant's character is peculiarly involved; and even in such cases, when the evidence of reputation is admissible at all, it is confined to the particular trait involved in the case. 1 Greenl. Ev. § 55; *Norris* v. *Stewart's Heirs*, 105 N. C. 455, 10 S. E. Rep. 912; *Fowler* v. *Insurance Co.*, 6 Cow. 673. In *Humphrey* v. *Humphrey*, 7 Conn. 116, the Court used this language: "The rule of law is that in civil proceedings, unless the character of the party be directly put in issue by the proceeding itself, evidence of his general character is not admissible. Swift, Ev. 140; 2 Starkie, Ev. 366. This rule has ever been regarded in our courts, and is too firmly established to be shaken at this day." In *Church* v. *Drummond*, 7 Ind. 17, the Court said: "The evidence of character in civil cases is thus confined within narrow limits. * * * The rule is that only in cases where the character is in issue can evidence of general reputation be given. Even then it must be confined to the reputation of the party with special reference to the nature of the question in issue."

Porter v. *Seiler*, 23 Pa. St. 424; *Wright* v. *McKee*, 37 Vt. 161. The fact charged in this cause of action—the assault with intent to rape—does not involve any particular trait of character, or impute to the defendant a reputation for general immorality and unchastity. The case was properly determined upon its own facts and circumstances.

Neither do we find any merit in plaintiff's appeal from the order granting a new trial on the third cause of action. Not only is there no evidence that her husband's affections were alienated, but, on the contrary, it affirmatively appears that his regard for her has not been at all disturbed by any of the scandalous matters which appear to have occurred. We are clear that the verdict upon this cause of action cannot be sustained. The evidence in the case is of such a character that we do not choose to discuss it at length. The orders of the lower court are both affirmed. All concur.

(79 N. W. Rep. 337.)

PLANO MANUFACTURING CO. *vs.* JOHN K. JONES.

Opinion filed May 4, 1899.

Warehouse Receipts—Conversion of Wheat.

Action for the conversion of wheat. Plaintiff had a chattel mortgage upon a crop of wheat. The mortgagor, after threshing the wheat, placed the same in elevators, and received the usual storage tickets therefor. Subsequently the mortgagor delivered the tickets to the defendant as collateral to a seed lien held by defendant against the mortgagor. Defendant did not have anything to do with placing the grain in the elevators, and never had the actual possession of the wheat. Prior to commencing the action, plaintiff demanded of defendant the wheat, or its proceeds, and the demand was not complied with. Upon such facts the trial court instructed the jury to the effect that the defendant, by virtue of the storage tickets held by him, had constructive possession of the grain, and that his refusal to comply with the demand operated as a conversion of the wheat, and, consequently, that an action would lie for such conversion. *Held*, that the instruction was error. The tickets did not entitle the defendant to demand or receive possession of any particular wheat, much less of the identical wheat upon which the plaintiff had a lien. See Best v. Muir, 8 N. D. 44, 77 N. W. Rep. 95.

Statement of the Case Should be Filed Before Making Motion for New Trial—Waiver.

Plaintiff had a verdict. Defendant served notice of intention to move for a new trial, embracing a notice that the motion would be made upon a statement of the case to be thereafter settled and allowed. A statement was thereafter settled and allowed. Subsequently, and pursuant to a stipulation between counsel, said motion was argued in the District Court, and no objection was ever made in that court that the statement had not been filed with the clerk at or prior to hearing the motion. *Held*, that correct practice requires that a statement of the case upon which a motion for a new trial is based should be filed with the clerk at or before the hearing of such motion, but that its nonfiling is a mere irregularity, which, in this case, was waived by counsel for the plaintiff.

Irregularities Cannot Be First Raised on Appeal.

Held, further, that the objection cannot be raised for the first time in this Court. The nonfiling, under the circumstances, was not jurisdictional to the hearing of the motion, nor to the order made thereon.

Appeal from District Court, Richland County; *Fisk*, J.

Action by Plano Manufacturing Company against John K. Jones. Judgment for plaintiff. Defendant appeals.

Reversed.

W. E. Purcell, for appellant.

Freerks & Freerks, for respondent.

WALLIN, J. This action was brought to recover damages for the alleged conversion of a crop of wheat upon which plaintiff claims a lien by virtue of a chattel mortgage. It is conceded that one Olson gave the mortgage to plaintiff, and that subsequently Olson raised the crop covered by the mortgage, and that he threshed the same, and thereafter placed the grain in certain elevators, and received the usual storage tickets for the same. It is conceded that Olson delivered such tickets to the defendant, but no claim is made that the defendant ever had the grain in his actual possession, or that he in any manner aided the mortgagor in placing the wheat in the elevator, or in removing it from the premises of the mortgagor. There is a dispute between counsel as to whether the evidence shows that the tickets were turned over to the defendant for safe-keeping only, or whether as plaintiff's counsel claims they were turned over to enable the defendant to realize upon a seed lien held by the defendant against the mortgagor. For the purposes of the case we will accept the theory of plaintiff, viz: that defendant held the tickets as collateral to his seed lien, and, consequently, that the defendant, as between himself and Olson, had a special property in the tickets. Before the action was instituted, a demand was made in plaintiff's behalf upon the defendant for the wheat, or the proceeds of the wheat; but no demand is shown to have been made for the tickets themselves, and, as has been said, the action is brought to recover for the conversion of the wheat. The turning point in the case arises upon the instructions given to the jury. Among other instructions to the same effect, the Court said to the jury: "If you believe by a fair preponderance of the evidence that such storage tickets were delivered to this defendant by Mr. Olson for the purpose of applying the proceeds thereof upon any indebtedness held by him against Mr. Olson, or if you find they were delivered to him for any other purpose than that of safe-keeping, as claimed by the defendant, and you also find from the evidence that while he had such storage tickets in his possession this plaintiff demanded possession of said wheat from the defendant, and he refused such demand, asserting that he had a prior right to said tickets, as against the said plaintiff, then his act in so refusing to deliver possession of such wheat would constitute in law a conversion, and your ver-

dict must be for the plaintiff." This instruction, with others of like import, were excepted to by counsel for the defendant, and the same are assigned as error in this Court. In our opinion, these instructions were unsound in law, and embodied prejudicial error. The plaintiff can recover in this action only by showing that the defendant, at some time prior to the commencement of this action, had the actual or constructive possession of the identical wheat covered by the plaintiff's mortgage. The Court charged the jury that there was no evidence showing that the defendant ever had the actual possession of such wheat. In our opinion, it is equally clear from the record that the defendant never had the constructive possession of the same. He never had constructive possession, because he was never in a position to legally obtain the actual possession of the identical grain upon which alone plaintiff claims a lien. It does not appear that the grain was in the possession of the elevator companies at the time the demand on the defendant was made for the same; and if it were there, and if demand had been made by defendant for the same, such demand could have been legally met and complied with by a delivery of other grain of like kind and quantity. Rev. Codes § 1791. The precise point in question was decided by this Court in the case of *Best* v. *Muir*, 8 N. D. 44, 77 N. W. Rep. 95. In the case cited, which was carefully considered, we held, upon a similar state of facts, that the plaintiff had mistaken his remedy, and had sued the wrong party. That case was on all fours with this, and must govern the case at bar.

A point of practice remains for consideration. After the verdict was returned, defendant gave notice of intention to move for a new trial upon a statement of the case thereafter to be settled. Later a statement of the case was settled and allowed, and thereafter, pursuant to a stipulation of counsel, the motion was argued by counsel for both parties, and was denied by the Court. The order denying the motion is, however, general in terms, and omits to state the grounds upon which it was made. Counsel for respondent now claims that the order cannot be reversed if it can be sustained on any grounds, and that it should be sustained, because, as counsel claims, "this statement was not filed in the office of the clerk of court until several days after the motion for a new trial was submitted and determined;" and counsel cites section 5467, Rev. Codes, as supporting his contention, the last sentence of which is as follows: "When settled, the statement must be signed by the judge with his certificate to the effect that the same is allowed, and shall then be filed with the clerk. Counsel also cite certain notes in Deering's Ann. Code Civ. Proc. Cal. p. 296, and *Parrott* v. *City of Hot Springs*, 9 S. D. 202, 68 N. W. Rep. 329. Upon these authorities counsel contends that it is not enough that the statement was actually settled pursuant to the notice of intention, and that counsel voluntarily appeared in the District Court, and argued the motion for the new trial, without objection, and that the Court decided such motion after hearing counsel, but that the further fact that the settled

statement had actually been filed with the clerk at the time the motion was argued must likewise appear affirmatively on the record sent to this Court, and that, if the filing does not so appear, this Court, in order to sustain the action of the trial court, will presume that the statement had not been filed when the argument was made below. Upon the question presented we remark first that the fact of the nonfiling of the statement below, as claimed, does not appear in the abstract of the record; but assuming, for plaintiff's benefit, that the record proper would reveal the fact to be as claimed by counsel, we shall hold, under the circumstances of this case, that the nonfiling was an irregularity merely, and was waived. The facts are that the motion was based upon a statement to be settled, and which was settled, pursuant to notice, prior to the hearing on the motion, and that counsel voluntarily appeared and argued the motion, no objection being made at any time that the statement had not been filed with the clerk of the District Court. We do not find that the precise point has ever been decided, and the authorities cited by counsel fail to do so. The cases cited in the notes in Deering's Code, supra, arose under the old practice act in California, and are not in point. The South Dakota case simply holds that, where the notice of intention stated that a motion for a new trial would be based upon a statement of the case, it was an essential prerequisite of the motion to settle a statement before hearing the motion. In that case no statement or bill was ever settled, and the Court very properly held that the order upon the motion could not be sustained for that reason. The question of whether the nonfiling of a statement could be waived or was waived was not discussed or decided in that case. This Court has held, upon a line of California cases, that, while a notice of intention is essential to a motion for a new trial in this state, such notice may be waived, and that a voluntary appearance and argument of the motion without objection would waive the notice. See *Fletcher* v. *Nelson*, 6 N. D. 94, 69 N. W. Rep. 53, and cases cited. We are of the opinion that the reasoning of the authorities last cited applies with equal, if not greater, force to the matter of the mere clerical act of filing a statement of the case. Such filing is not jurisdictional to the motion in the sense that the filing cannot be waived. The point is highly technical in its character, and hence is not to be favored. We hold that such an objection cannot be raised for the first time in this Court. See 6 N. D. 94, 69 N. W. Rep. 53, supra. Upon the merits, and for reasons already stated, the order denying the motion for a new trial and the judgment entered herein are reversed, and a new trial granted. All the judges concurring.

(79 N. W. Rep. 338.)

JOSEPH BAUMER *vs.* JESSE R. FRENCH.

Opinion filed May 5, 1899.

Motion for New Trial—Specification of Particulars.

Where, in a jury case, a motion to vacate the verdict and for a new trial is made upon a statement of the case, which omits specifications stating in what particular the verdict is not justified by the evidence, the trial court is without authority to grant the motion upon that ground, and in such case the trial court is, by the express terms of the statute, required to disregard the statement as to such feature.

New Trial on Stated Case Without Specification of Particulars—Error.

In such a case it does not matter that counsel on both sides argue the motion generally upon the facts and the evidence, or that counsel for the respondent did not call the attention of the trial court to the fact that proper specifications were not embodied in the statement of the case. Accordingly, *held*, that an order granting such motion, under such circumstances, upon that ground, and that only, is reversible error. Authority to rule in such case cannot be conferred by agreement of counsel. The authority to vacate a verdict upon such ground exists only by virtue of the statute, and can only be exercised upon a compliance with the terms stated in the statute in all vital particulars.

Record May Be Remanded for Correction.

Upon a proper showing, a record sent to this Court on appeal will be returned to the District Court for correction and amendment; but in such cases the District Court is authorized only to supply defects and omissions in the record, by inserting therein any matter of fact or of procedure which was before the trial court, and upon which it acted in making the rulings which are sought to be reviewed on appeal. But in such cases nothing new, however vital it may be to the case, can be first originated and then interpolated in the record to be returned to this Court. To allow this would be to permit the reviewing tribunal to pass upon matters which were not before the court of original jurisdiction when it made its decision.

Motion to Remand to Insert Specifications Refused.

This cardinal rule of appellate procedure is applied to this case, and accordingly it is *held* that the respondent's motion to return the record, for the purpose of amending the same by adding thereto essential specifications omitted from the statement of the case as originally settled and allowed, must be denied.

Rejection of Evidence Proper.

Held, further that the admission of certain evidence referred to in this opinion was not error.

Appeal from District Court, Richland County; *Lauder*, J.

Action by Joseph Baumer against Jesse R. French. Verdict for plaintiff. From an order granting a new trial, he appeals.

Reversed.

Freerks & Freerks, for appellant.

The court can vacate a verdict and grant a new trial on its own

motion only where the error of the jury is so gross as to be at once apparent, and the court should exercise its power as soon as the verdict is rendered. Hayne New Trials, § 10; *Gould* v. *D. & D. Elev. Co.*, 2 N. D. 216; *Clement* v. *Barnes*, 6 S. D. 483, 61 N. W. Rep. 1126. A statement of the case shall have incorporated a specification of particulars in which the evidence is alleged to be insufficient to justify the verdict. The statute is mandatory. The right to move for a new trial is statutory and must be pursued in the manner pointed out. *Henry* v. *Maher*, 6 N. D. 413; *Thompson* v. *Cunningham*, 6 N. D. 426; *Hostetter* v. *Elev. Co.*, 4 N. D. 357; *Parrott* v. *City*, 68 N. W. Rep. 329; *Chandler* v. *Kennedy*, 65 N. W. Rep. 440; *Illstad* v. *Anderson*, 2 N. D. 167; *Tuet* v. *Strong*, 7 N. D. 565; *McTavish* v. *Great Norhtern R. Co.*, 8 N. D.——. Without specifications the statement should be disregarded. *Spencer* v. *Long*, 39 Cal. 700; *Budd* v. *Drais*, 50 Cal. 120; *Brumagim* v. *Bradshaw* 39 Cal. 24; *Hutton* v. *Reed*, 25 Cal. 479; *Caldwell* v. *Greely*, 5 Nev. 262. And they cannot be waived. *Walls* v. *Preston*, 25 Cal. 60; *Parrott* v. *City*, 9 S. D. 202; *Chandler* v. *Kennedy*, 65 N. W. Rep. 440. A statement of the case without specifications is a nullity. *Henry* v. *Maher*, 6 N. D. 414. The stated case such as it was, had not been filed with the clerk of court before the motion was heard. § 5476 Rev. Codes. It was not error to allow plaintiff during the trial to amend his complaint: *Anderson* v. *Bank*, 5 N. D. 80; *Connor* v. *National Bank*, 7 S. D. 439, 64 N. W. Rep. 519; *Johnson* v. *Gilmore*, 6 S. D. 277, 60 N. W. Rep. 1070. Defendant could not urge for error the overruling of his motion for a directed verdict at close of plaintiff's case, because his motion was not renewed when all the evidence was in. *Bowman* v. *Eppinger*, 1 N. D. 21; *Colby* v. *McDermont*, 6 N. D. 495; *Henry* v. *Maher*, 6 N. D. 414; *Association* v. *Willard*, 48 Cal. 617; *Railway Co.* v. *Cummins*, 106 U. S. 700. It was discretionary with the trial court to permit plaintiff to reopen his case to prove demand. But both parties claiming ownership of the property in dispute, a demand and proof of it were unnecessary. *Consolidated L. & I. Co.* v. *Hawley*, 7 S. D. 229, 64 N. W. Rep. 904; *Johnson* v. *Gilmore*, 6 S. D. 277. "That the verdict is not supported by the evidence" is a question not properly here for review. *Henry* v. *Maher*, 6 N. D. 414; *Sioux Banking Co.* v. *Kendall*, 6 S. D. 543, 62 N. W. Rep. 377; *Donahue* v. *Gallavan*, 43 Cal. 573.

W. E. Purcell, for respondent.

The omission from the statement of the case of a specification wherein the evidence was insufficient to justify a verdict, was not discovered until after the motion had been argued in the court below and a new trial ordered, and the record sent to this court. The motion of respondent to remand the record for correction and amendment, is discretionary. *Coulter* v. *Ry. Co.*, 5 N. D. 585; *Moore* v. *Booker*, 4 N. D. 543; §§ 5625, 5297, 5298, Rev. Codes; *Foley* v. *Porteous*, 7 S. D. 34, 63 N. W. Rep. 155; *Catlin* v. *Cole*, 19

How. Pr. 82; *Foot* v. *Colvin*, 2 Johns. 481; *Merchants' Nat. Bank* v. *McKinney*, 6 S. D. 58, 60 N. W. Rep. 162; *Ingerman* v. *Moore*, 90 Cal. 410. At common law where any portion of the proceedings of the trial court were omitted from the record through error or inadvertence the appellate courts awarded certiorari to enable the party to bring it upon the record. *Ballance* v. *Leonard*, 40 Ill. 72; *Illinois, etc. R. Co.* v. *Garrish*, 40 Ill. 70; *Collins* v. *Baker*, 6 Mo. App. 588. In nearly every state the courts of last resort have allowed the withdrawal of the record for the purpose of amendment and correction. *Alabama, etc. R. Co.* v. *Hungerford*, 41 Ala. 388; *Knox* v. *McFerran*, 4 Colo. 348; *Smith* v. *Wrightsville* (Ga.) 10 S. E. Rep. 361; *Bergen* v. *Riggs*, 40 Ill. 61; *Brooks* v. *Brinn*, 40 Ill. 64; *Tomlinson* v. *Furston*, 1 G. Greene 544; *Williams* v. *Thompson*, 4 Ky. Law Rep. 9; *Childers* v. *Allen*, 15 La. 500; *McCarra* v. *McNulty*, 73 Mass. 139; *Yale* v. *Coddington*, 21 Wend. 175; *Livingston* v. *Miller*, 7 How. Pr. 219; *Ballard* v. *Carr*, 15 N. C. 575; *Bradley* v. *Smith*, 6 Ohio 490; *Wright* v. *Bouta*, 19 Tex. 385; *McFarland* v. *West Side Imp. Co.*, 66 N. W. Rep. 637; *Vroman* v. *Dewey*, 22 Wis. 360. The correction may be either in form or substance. *Cervantes* v. *U. S.*, 57 U. S. 619; *O'Flynn* v. *Holmes*, 7 Mich. 44; *Hoagland* v. *Van Etten*, 43 N. W. Rep. 422; *Male* v. *Leggett*, 1 S. E. Rep. 622; *Hay* v. *Lewis*, 39 Wis. 364; *Phoenix* v. *Gardner*, 13 Minn. 252; *Buye* v. *Simmons*, 90 N. C. 9. A stronger case must be made to justify a reversal when a new trial has been granted than when it has been refused. *Morrow* v. *Letcher*, 71 N. W. Rep. 139. A new trial for insufficiency of the evidence to justify the verdict, rests in the sound discretion of the trial court. *Gull River L. Co.* v. *Osborn-McMillan Elev. Co.*, 6 N. D. 276; *Braithwaite* v. *Aiken*, 2 N. D. 57; *Patch* v. *Ry. Co.*, 5 N. D. 55. That the statement of case was not filed when the motion for new trial was heard has been waived. The objection should have been made in the trial court. *Matteson* v. *Curtis*, 11 Wis. 424; *Jones* v. *Hockman*, 12 Ia. 101; *McGrath* v. *Fallent*, 7 Utah 256. A party cannot assign as error what he assented to below. *Chesley* v. *Boom Co.*, 38 N. W. Rep. 769; *Thompson* v. *Connolly*, 43 Cal. 636.

WALLIN, J. The facts which we deem to be decisive in this case may be briefly stated as follows: The action was brought to recover the possession of certain farm machinery, and the trial resulted in a verdict for the plaintiff. Subsequently the defendant served notice of intention to move for a new trial and to vacate the verdict. Said notice contained a statement that said motion would be made upon a statement of the case, and also upon affidavits thereafter to be served. No affidavits were in fact served or used, and the motion was heard upon a statement of the case. The specifications of error incorporated in the statement were numerous, but in this opinion it will not be necessary to deal with any of the alleged errors of law contained in the statement, save one, which will be hereinafter

discussed. The statement embraced, also, the following attempted specification of error: "That said verdict is against the clear weight of evidence, and not supported by the evidence." But the statement did not attempt to show in what particular, or wherein, the evidence failed to sustain the verdict. The motion for a new trial was argued by counsel, and thereafter the trial court granted the motion, and entered its order vacating the verdict and granting a new trial; said order being general in its terms, and containing no particular grounds or reason for granting the motion. From this order the plaintiff has appealed to this Court, and, pursuant to such appeal and at considerable expense, has prepared and printed a brief and a voluminous abstract of the record, and has served the same upon respondent's counsel, and copies of the same are now filed in this Court. In this Court counsel for the respondent has made a motion for an order transmitting the record herein to the District Court, from whence it came, for "amendment"; said motion being based upon the files in this Court, and also upon affidavits of counsel for the respondent and upon a certificate made by the trial judge. Counsel for the appellant has also filed affidavits in opposition to such motion.

The material averments in the affidavit of W. E. Purcell, Esq., attorney for the respondent, are as follows: "That this affiant, as attorney for the said defendant and respondent, in preparing the assignments of error, supposed that he had incorporated therein the assignment of error, to-wit: that 'the evidence was insufficient to justify the verdict'; that he had instructed Charles E. Wolfe, who prepared said statement of the case and assignments of error attached thereto, to assign as an error that 'the evidence was insufficient to justify the verdict'; that the statement of the case, as served, failed to show the said assignment of error last mentioned; that when the said motion for a new trial came on to be heard before the court this affiant appeared as attorney for the defendant and respondent in support of said motion, and George W. Freerks, Esq., attorney for the plaintiff and appellant, appeared in opposition to said motion for a new trial; that on the argument of said motion this affiant stated to the Court, in the presence of said George W. Freerks, that he based this motion solely and alone upon the assignment of error that 'the evidence was insufficient to justify the verdict'; that he argued that ground before the court, and that was the only ground upon which the motion for a new trial was based; that in support of said motion this affiant cited the case of *Gull River Lumber Co.* v. *Osborne-McMillan Elevator Co.*, reported on page 276 of volume 6 of the North Dakota Reports (69 N. W. Rep. 691), and Hayne on New Trial and Appeal; that the said George W. Freerks, Esq., argued, in opposition to said motion, only and solely the question as to whether or not the evidence was insufficient to justify the verdict; that that was the only question argued on said motion, and that at the time of the argument of said motion this affiant and the Honorable W. S. Lauder, judge of said court, believed that in the assignment of error attached to the statement of the case served this error,

to-wit: that 'the evidence was insufficient to justify the verdict,' was incorporated in the assignments of error; that the said George W. Freerks made no objection to the argument of the motion for a new trial upon the ground that the assignment of error did not contain the assignment that 'the evidence was insufficient to justify the verdict'; that he neither called the attention of the Court nor of counsel, on the argument of the motion for a new trial, to the fact that the record did not contain said assignment. Affiant further says that the Court, in deciding the motion for a new trial, and in granting the same, stated that his reason for granting the defendant's motion for a new trial was upon the ground that 'the evidence was insufficient to justify the verdict,' and instructed affiant, in drawing the order granting a new trial of said action, to incorporate in the order that he granted said new trial for the reason that in his judgment the evidence was insufficient to justify the verdict, that the verdict was against the evidence, and that a new trial of the case should be had; that this affiant, when the Court had informed him of his judgment in the matter, instructed said Charles E. Wolfe, who is in his employ and associated with him in said case, to draw an order granting a new trial of said cause, and to incorporate in said order that above stated by the Court; that this affiant always supposed that the assignments of error attached to the statement of the case contained the assignment of error that 'the evidence was insufficient to justify the verdict'; that the Court supposed the same was in the record, and acted thereon, and granted the motion for a new trial, believing the same to be in the record; that the error was not discovered until after the time the appellant had commenced to print the record. Affiant therefore asks that the above court remand said record to the District Court, to enable the District Court to correct the same by adding thereto, in the assignments of error, that the 'evidence was insufficient to justify the verdict.'" Another affidavit in respondent's behalf was made by Charles E. Wolfe, Esq., who was in the employ of the attorney for respondent, and who prepared the statement of the case. The material parts of the last-mentioned affidavit are as follows: "In the preparation of such statement of the case affiant was assisted by two different stenographers, to whom parts of such statement of the case were dictated, and the affiant wrote part of such statement of the case in person; that by an oversight, either of this affiant or one of the stenographers to whom he dictated parts of such proposed statement of case, a specification of error that 'the evidence was insufficient to justify the verdict' was unintentionally omitted; that it was affiant's intention throughout the preparation of such proposed statement of the case to assign such error, and that he honestly believed that the same had been assigned and incorporated in said proposed statement of case; that he never knew of the omission of such assignment until on or about the 10th day of December, 1898." After reciting the fact that the motion for a new trial was heard in the month of July, 1898, upon

a statement of the case, the trial judge certifies as follows: "The motion for a new trial was granted. The decision of the District Court in granting said motion was based wholly upon the ground that in my opinion, while it would have been error, perhaps, to have directed a verdict for the defendant, in view of the state of the evidence, justice required that the cause should be retried, and submitted to another jury. This decision and the grounds thereof were orally announced to defendant's counsel, and I directed counsel for the defendant to incorporate in the order granting a new trial the grounds thereof, as heretofore stated. When I signed the order granting a new trial, I supposed said order contained the grounds upon which, as before stated, the decision was based. I have since been informed that this is not a fact. I therefore ask that the record be remanded to the District Court, that the same may be corrected in this particular." George W. Freerks, one of the attorneys for the appellant, who made an argument upon the motion for a new trial, avers in his affidavit, filed in opposition to the respondent's motion to transmit the record, that the motion for a new trial was heard on the 8th day of July, 1898, and then proceeds as follows: "At which time the said attorneys appeared before the said court; that said affiant, George W. Freerks, then proceeded to discuss certain propositions of law concerning said action, and that the judge of said court indicated that he desired to have the facts in the case discussed; that said George W. Freerks there stated to the Court as follows: 'We argued the facts of this case before the jury, and we do not care to take the time of the Court in going over the facts again at this time,'—or that in substance; and that the facts of this case and the matter of the sufficiency of the evidence to sustain the verdict were not argued in behalf of the plaintiff by his attorneys, or at all, on the hearing of said motion." This affidavit is also verified by the oath of Martin C. Freerks, who is one of plaintiff's attorneys. It further appears by the last-mentioned affidavit that among the specifications of error actually embodied in the statement of the case was the following: "That the said verdict is against the clear weight of the evidence, and is not supported by the evidence."

The question presented upon the state of facts above set out is whether, under the established practice, it is the duty of this Court to transmit the record to the District Court for amendment. It is a somewhat remarkable fact that the affidavits filed in respondent's behalf state, in substance, and frequently reiterate the statement, that a certain specification of error, viz: one to the effect that the verdict is not justified by the evidence, was not embodied in the statement of the case, and that such specification was unintentionally and by accident omitted from the statement. This is an obvious mistake of fact, as appears, not only by the appellant's affidavits, but also from the original record and the printed abstract thereof on file in this Court; and we have already set out the exact terms of said specification as it appears in the statement,

and as it stood at the time the motion for a new trial was argued in the court below. It is therefore obvious that the real purpose of respondent's motion to transmit this record is not to enable the respondent to supply an omitted specification of error, but is, on the contrary, to enlarge and perfect an existing specification by inserting therein certain necessary particulars omitted from the original statement. The moving papers of the respondent filed in this Court contain no draft of any particular specifications which respondent's counsel will ask the trial court to incorporate in the statement if the papers are sent back as requested. It follows that, if the papers should be returned for amendment in this feature, counsel for respondent will be unrestricted as to the number and character of any specifications which he may desire to introduce into the specification in question. It is not contended that another motion to vacate the verdict, and for a new trial, based upon an amended statement of the case, can be made or would be legally possible. Nothing of the kind is suggested. From this it necessarily follows that the programme of counsel is to ask this Court to review the order granting a new trial, not upon any specifications of error contained in the statement actually before the trial court, and upon which its order is necessarily based, but upon specifications essentially different, and such as counsel shall hereafter see fit to frame and have inserted in a new statement of the case, to be filed later in this Court, and this against the emphatic protest of appellant's counsel.

In this case we shall follow a general rule, and hold that the decision made by the court below is conclusive upon the disputed question of fact as to whether counsel discussed the facts and evidence on both sides upon the argument of the motion for a new trial; and our ruling will accordingly be based upon the statement of the judge, as above set out, to the effect that the decision of the court upon the motion was confined to the facts and the evidence in the record, and that the order was based wholly upon the facts and the evidence, to the exclusion of alleged errors of law. Assuming this to be so, we are unable to see how that fact can aid the respondent. The statute is explicit upon the point. In the absence of specifications of particulars, it is the duty of the trial court and of this Court, under the mandate of the statute, to disregard the statement upon which a motion for a new trial is made. There is no claim that particular specifications were in fact drawn and actually discussed by counsel or considered by the Court on the hearing of the motion. If such a showing had been made, followed by a showing that such specifications were by some inadvertence not annexed to the settled case, a widely-different question would have been presened. Under certain circumstances the practice of sending down a record for amendment is entirely proper, and this Court has had occasion to so hold. See *Coulter* v. *Railway Co.*, 5 N. D. 568, 67 N. W. Rep. 1046. And this Court also has a standing rule, framed expressly to facilitate the practice in this class

of cases. See Rule 33, 6 N. D. xxviii., 74 N. W. Rep. xii. In the case cited, this Court, in its opinion (page 585, 5 N. D., and page 1051, 67 N. W. Rep.), in speaking of the act of a trial judge in settling a statement, used the following language: "He merely embodies in authentic form a record of the proceedings already had, and on which his previous judicial action was predicated, to the end that the appellate court may determine whether such previous judicial action was legal or erroneous." This language states a cardinal rule of appellate procedure. A statement is made to bring upon the record the data upon which the trial court based its determinations. Its office is to present the actual facts, events, and procedure as they existed when the action of the trial court was taken thereon. Applying this familar rule, it is easily seen that a record should never be transmitted to a trial court for amendment in a case where the avowed object of the moving party is not to bring upon the record any event or matter of procedure which actually existed or took place in the court below, but is, on the contrary, to supply something which is vital in the case, and which never existed or took place in the trial court, but was for some reason omitted therein. The case at bar presents such a state of facts. The motion papers disclose the fact that the trial court vacated the verdict and granted a new trial upon the sole ground that the verdict was not justified by the evidence; and the further fact appears that the statement of the case upon which the motion for a new trial was based embraced no attempt to state the "particulars in which the evidence is alleged to be insufficient." Under the express terms of the statute (Rev. Codes, § 5467), the order granting a new trial was reversible error. Under the system which the legislature has adopted, specifications of error in jury cases are vital, and are not mere matters of form. Authority upon this point would be superfluous. The purpose of respondent in asking this Court to transmit the record to the District Court is to enable the Court, against the consent of the appellant, to amend the statement by inserting a vital feature therein, viz: by inserting specifications of particulars which will point out wherein the evidence is alleged to be insufficient. This amendment is sought not for use in the Court below, but solely to be used by this Court as a basis for reviewing the order granting a new trial. It is perfectly clear to our minds that this should not be permitted. To allow it would constitute a precedent upon which similar action could be taken in all cases tried to a jury in which the court below either grants or refuses a new trial without specifications of error. If the evidence can be reviewed without specifications of particulars in the court below, errors of law could likewise be so reviewed, and for similar reasons. To so rule would be in defiance of the express terms of the statute, and would likewise be directly subversive of a system of procedure of great value, and one long established in this state and many others. There were no specifications of particulars before the trial court when it heard the motion, and none when it made its order.

It must follow, therefore, that this court will proceed to review the order upon the same record. *Thompson* v. *Patterson,* 54 Cal. 542, and cases there cited. Also *Preston* v. *Hearst,* Id. 595. The case last cited is directly in point. In that case the trial court, after an order denying a new trial had been appealed from, made an order allowing specifications of error to be filed nunc pro tunc in the court below. The Supreme Court held that the statement could not be thus amended, and that the original statement was fatally defective, because it contained no specifications of error.

Upon the record, it is doubtful, to say the least, whether this Court can properly consider specifications of error of law in the statement, none being considered in the court below. But, as the result in this case will not be affected by so doing, we will, without deciding the point, dispose of one question, and the only one upon the merits which was discussed by counsel or submitted for our decision. At the trial one McMichael was a witness, and testified for the defendant. On his cross-examination a document in the form of an affidavit, purporting to have been subscribed and sworn to by the witness, was shown the witness, and he identified the same as a paper signed by him at the office of the plaintiff's counsel at a date prior to the trial. The witness testified that he signed the instrument, but was not sworn at that time, and that he never in fact swore to the statement in it. This testimony was not contradicted, despite the fact that the plaintiff's counsel who conducted the cross-examination was the notary who affixed the jurat to the affidavit. Under the circumstances, therefore, we think that the fact is established, for the purpose of this case, that the document in question is not an affidavit. This Court has recently held that the jurat to an affidavit is, as a general rule, only prima facie evidence, and may be rebutted. See *Turner* v. *St. John,* 8 N. D. 245, 78 N. W. Rep. 340. The document in question was offered in evidence by the plaintiff, and was objected to on the ground that it was incompetent, irrelevant, and immaterial, but was not objected to as not tending to impeach the witness. The paper was admitted in evidence, and the ruling is assigned as error. Respondent's counsel contends that the document is an extrajudicial oath, and that, under sections 6995, 6996, Rev. Codes, the witness and the notary were guilty of a misdemeanor,—the one for being sworn, and the other for administering the oath; and from these premises counsel argue that the paper, being under the ban of the statute, is a legal nullity, and cannot be used even as evidence. As to this we need only say that the statute makes no such announcement in terms, nor is it apparent to us why a writing signed by a party may not be referred to as evidence of its contents. But, in this case, as has been seen, the instrument is a mere written statement, signed by the witness, and not verified by his oath. Its introduction in evidence was not objected to upon the ground that it did not tend to impeach the witness; but, if this objection had been made, we are of the opinion that it would not have been a valid objection.

The statements made by the witness upon his oral examination were material upon the main question in the case, and such statements were in square conflict with those made in the document offered in evidence. This being so, the document was competent evidence, as tending to impeach the witness, and for this purpose alone it must have been offered. It follows that this assignment of error must be overruled.

From what has been said, our conclusion upon this record is that the order appealed from must be reversed. All the judges concurring.

(79 N. W. Rep. 340.)

LEONARD J. HANBERG, *et al. vs.* NATIONAL BANK OF WAHPETON.

Opinion filed May 6, 1899.

Appealable Order.

After a hearing in the District Court upon an order to show cause, and pursuant thereto, the District Court entered an order dismissing this action. The material part of said order is as follows: "Ordered, that the said action be, and the same hereby is, dismissed, without costs to either party. Let judgment be entered accordingly. Dated this 10th day of December, 1898. W. S. Lauder, Judge of the District Court." From this order the plaintiff has attempted to appeal to this Court. *Held*, that the order is nonappealable. The appeal is therefore dismissed.

Appeal from District Court, Richland County; *Lauder*, J.

Action by Leonard J. Hanberg and Henning L. Hanberg against the National Bank of Wahpeton. From an order dismissing the complaint, plaintiffs appeal.

Dismissed.

Freerks & Freerks, for appellants.

W. E. Purcell, for respondent.

WALLIN, J. After issue was joined in this action, and pursuant to a hearing had in the District Court upon an order to show cause why the action should not be dismissed, the District Court made an order dismissing the action. After excluding immaterial recitals, said order reads as follows: "Ordered, that the said action be, and the same hereby is, dismissed, without costs to either party. Let judgment be entered accordingly. Dated this 10th day of December, 1898. W. S. Lauder, judge of the District Court." From said order the plaintiffs have attempted to appeal to this Court, and in that behalf have served and filed a notice of appeal and an undertaking on appeal, which notice and undertaking were in the usual form, and were transmitted to this Court with the record. In this Court the point is made by respondent's counsel that the order of the District Court is not an appealable order, and hence that this Court is without jurisdiction to determine the merits. The point

is well taken, and must be sustained. See In re Weber, 4 N. D. 11, 59 N. W. Rep. 523; *Cameron* v. *Railway Co.*, 8 N. D. 124, 77 N. W. Rep. 1016; *Locke* v. *Hubbard* (S. D.) 69 N. W. Rep. 588; *Field* v. *Elevator Co.*, 5 N. D. 400, 67 N. W. Rep. 147. The appeal will be dismissed. All the judges concurring.

(79 N. W. Rep. 336.)

ERNEST MARES *vs.* HARRY WORMINGTON, *et al.*

Opinion filed May 9, 1899.

Amendment of Complaint Improperly Allowed.

In an equitable action originally brought for the sole purpose of foreclosing a seed lien upon a crop of wheat raised by the defendant Wormington, the trial court, at the close of the evidence, and against the objection of counsel, permitted the plaintiff to file an amended complaint, in which it was alleged, as a second and new cause of action, that the defendants, acting jointly, had unlawfully converted the grain upon which the plaintiff claimed to have a seed lien, and asked for a money judgment for damages for such alleged conversion. *Held*, that the amendment was improperly allowed, and was prejudicial error. The new cause of action sounded in tort, and did not belong in the same class with the original cause of action, and hence was improperly united in the same complaint with the original cause of action.

Improper Joinder of Causes of Action—Demurrer.

A demurrer to the amended complaint upon the ground that two causes of action were improperly united therein was overruled. *Held*, that the ruling was error.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Ernest Mares against Harry Wormington and others. Judgment for plaintiff, and defendant Ernest C. Eddie appeals. Reversed as to him, with directions to dismiss.

Benton, Lovell & Bradley, for appellant.

The court had no authority under § 5297, Rev. Codes, to allow an amendment setting up a new cause of action, to correspond with the proofs. Such is the holding under similar statutes. *St. Louis, etc. Ry. Co.* v. *Dodd*, 27 S. W. Rep. 227; *Miles* v. *Van Horn*, 17 Ind. 245; *Shropshire* v. *Kennedy*, 84 Ind. 111; *Sweeter* v. *Hartwick*, 25 N. W. Rep. 744; *Smith* v. *Bogenschutz*, 19 S. W. Rep. 667; *Bruns* v. *Schieber*, 51 N. W. Rep. 120; *Egert* v. *Wecker*, 10 How. Pr. 193; *Southwick* v. *Bank*, 84 N. Y. 420; *Cumber* v. *Schoonfeld*, 12 N. Y. Supp. 282; *Button* v. *Steam Tow Boat Line*, 40 Hun. 422; *Robbins* v. *Harris*, 2 S. E. Rep. 70; *Spice* v. *Steinruck*, 14 Ohio St. 213; *Stevens* v. *Brooks*, 23 Wis. 196. The cause of action for the establishment and foreclosure of plaintiff's lien could not in the face of a demurrer be joined with an action for conversion. Pomeroy's Rem. § 473. 474 and 475; *Cobb* v. *Dows*, 9 Barb. 230; *Colwell* v. *Ry. Co.*, 9 How.

Pr. 311; *Hoagland* v. *Ry. Co.*, 39 Mo. 451; *Hunter* v. *Powell*, 13 How. Pr. 221; *Thompson* v. *Bank*, 61 How. Pr. 163; *McDonald* v. *Kountze*, 58 How. Pr. 152; 1 Enc. Pl. & Pr. 195; *New York & N. W. R. Co.* v. *Schuyler*, 17 N. Y. 592, 604.

Smith Stimmel, for respondent, cited *Butler* v. *Barnes*, 12 L. R. A. 273, *Paddock* v. *Somes*, 10 L. R. A. 254; *Fuchs* v. *Meisel*, 32 L. R. A. 92; *Corcoran* v. *Mannering*, 41 N. Y. Supp. 1090; *Fairbanks* v. *San Francisco*, 47 Pac. Rep. 450; *Eagle Iron Wks.* v. *DesMoines R. Co.*, 70 N. W. Rep. 193; *N. W. Ry. Co.* v. *Prior*, 70 N. W. Rep. 869.

WALLIN, J. The essential facts in this case, as disclosed by the record, are as follows: The complaint, before its amendment, as hereafter stated, embodied a single cause of action for equitable relief. Its statements of fact had reference only to a seed lien claimed by the plaintiff upon a crop of wheat raised by the defendant Wormington in 1892 upon two tracts of land in Cass county, situated some miles apart. The only reference made in the original complaint to the defendants Lynch and Eddie is embraced in the following language: "That the defendants Ernest C. Eddie and Frank Lynch have, or claim to have, some interest in or lien upon the crop grown upon the lands above described for the year 1892, as aforesaid, or some part thereof, which interest or lien, if any, is subsequent to the plaintiff's said lien; that said defendants Eddie and Lynch have taken possession of said crop of wheat, claiming to hold under their said lien or interest." Among other features of the prayer of this complaint, the plaintiff asked as follows: "That said grain, or so much thereof as may be necessary for the purpose, be sold to satisfy said lien." And further: "That the lien or interest of each of said defendants Ernest C. Eddie and Frank Lynch be adjudged to be subsequent and inferior to plaintiff's said lien." To this complaint the defendants Wormington and Lynch answered jointly by a general denial, and the defendant Eddie answered separately to the same effect. Upon the issues so joined a trial was had without a jury, at which the plaintiff offered testimony in support of the allegations of the complaint, and the defendants Wormington and Lynch offered evidence in support of their defense. At the close of the evidence, and before findings were filed, the plaintiff filed an amended complaint, upon which the trial judge indorsed the following order: "This amended complaint is this day filed by leave of the court, before the settlement of the findings, in furtherance of justice, and in order that the facts alleged may conform to the proof offered at the trial, to all of which defendants, by their counsel, object and except, which exception is allowed, and made a part of the record. And now at this time, and before the findings are signed and settled, the court offered counsel for the defendants Eddie and Lynch the right to answer the amended complaint of plaintiff, and to submit any testimony or proof they may have growing out of this amended form of the pleadings, and to this end offers to adjourn the case a reasonable time to allow the defendants to

submit such proof. Done in open court, this 6th day of August, 1898." The amended complaint incorporated a second cause of action, the material part of which is set out in the following language: "That when said wheat was threshed in the fall of 1892, as aforesaid, the defendants, then being in possesion of said wheat, unlawfully converted and disposed of the same to their own use, to the damage of the plaintiff in the sum of $295.20, with interest thereon at the rate of seven per cent. per annum from the 15th day of October, 1892." In this complaint, among other things prayed for, was a money judgment against all the defendants jointly for the amount above stated. To the second cause of action as stated in the amended complaint the defendant Eddie interposed a separate demurrer upon the grounds: (1) That there is a defect of parties defendant; (2) that several causes of action have been improperly united; (3) that the complaint—*i. e.* the alleged second cause of action—does not state facts sufficient to constitute a cause of action. The trial court overruled this demurrer, and the defendant Eddie elected to stand on the demurrer; whereupon the trial court, after making and filing its findings, entered judgment for the plaintiff. The defendant Eddie appeals to this Court from the judgment and from the order overruling the demurrer. The judgment against Wormington was for the sum of $295.20, with interest; the judgment against Lynch was for $85.95, with interest; and Eddie was mulcted to the amount of $123.30, with interest. Costs were adjudged against all the defendants in the sum of $72.50.

We notice here that one reason given by the court below for allowing the complaint to be amended was to make it conform to the facts proved. The evidence was undisputed, and established the following facts: First, in 1892, the defendant Wormington raised a crop of wheat upon two quarter sections of land in Cass county, and upon which crops the plaintiff had a seed lien. The defendant Lynch was interested as part owner in one of the tracts, and the defendant Eddie was the agent of the administrator of an estate to which the other tract had once belonged, but the same had been previously sold to defendant Wormington on the crop-payment plan. The defendant Wormington, after threshing the crop, turned over to Lynch portions thereof by loading the same in cars, and shipping it to Lynch at Duluth, Minn.; and he also shipped to Eddie, at Duluth, a certain other part of said crop; but these shipments were made at different times, and were wholly independent of each other, and there was no community of interest as between defendants Lynch and Eddie, but, on the contrary, their claims upon the wheat were wholly distinct from each other, and neither had anything to do with the grain shipped to the other. Nor does it appear that they have any common interest in either of the two parcels of land upon which the grain was grown. Under such circumstances the act of Eddie in receiving the grain which he received at Duluth, and which was grown upon the land for which he was agent, was his own act, and, if it was an unlawful act as against the plain-

tiff, it was his individual wrong, and the defendant Lynch was not, as to such wrong, a joint wrongdoer. The same is equally true with respect to the grain shipped to Lynch. As to such shipment, Eddie is not a joint wrongdoer, if it was a wrong. It is manifest from this statement that the new cause of action, as stated in the amended complaint, is entirely erroneous in its averment of fact. It does not conform to the evidence, in that it sets up a joint conversion of the wheat, whereas the undisputed evidence shows that there was no joint conversion of the wheat as between Lynch and Eddie, who, it appears, did not at any time act in concert. If the second cause of action had been framed to meet the evidence, the amendment would have been demurrable upon its face for an improper joinder of parties defendant. Under the evidence, Lynch would be an improper party as to Eddie's individual tort, and Eddie could not be lawfully made a co-defendant as to the independent tort of Lynch. But it is manifest from the terms of the order allowing the amendment that the trial court did not have in mind merely a formal amendment of the pleading to conform the same to evidence already offered. The court, on the contrary, expressly permitted the defendants Lynch and Eddie to answer the amended complaint, and offer evidence in its support, if they saw fit to do so. This ruling undoubtedly opened the case for all purposes, and contemplated a trial upon new issues raised upon the averments of the amended complaint. In our judgment, the trial court exceeded its authority in permitting an entirely new cause of action to be set out in the complaint by way of an amendment. Under the original complaint neither of the defendants would have been entitled to a jury trial, and they were guilty of no laches in going to trial upon the original complaint without demanding a jury. The only relief originally asked was equitable relief, and as to Lynch and Eddie the plaintiff asked only that their alleged liens upon the crop be adjudged inferior to the plaintiff's seed lien. They answered, denying that they had liens on the crop, and the evidence disclosed none in their favor. But under the amended complaint a radical change was wrought in the essential character and objects of the action. The new complaint set out a joint tort committed by all the defendants by a conversion of the crop in question. This allegation set out a cause of action at law for a tort and one for damages only. Under it all parties would be entitled to a trial by jury, and the matter of the seed lien would cut no figure, except for the purpose of showing that the plaintiff was in a position to sue in conversion for damages. In brief, the alleged new cause of action was not simply new, it was radically different in its nature and objects, and also in its mode of trial. It is true that the authorities are not entirely harmonious upon the point, but the decided weight of the cases, and, we think, the better reason, is against allowing an entirely new cause of action to be set up by way of an amendment to a complaint. This could never be done, either at common law or in the chancery practice. See Bliss, Code Pl. §

429. The power of amendment has been much enlarged by statute, but the power is nevertheless limited, and cannot be arbitrarily exercised. A new and distinct cause of action cannot be thrust into a complaint by amendment. See *Reeder* v. *Sayre*, 70 N. Y. 190; *Button* v. *Towboat Line*, 40 Hun. 422; *Davis* v. *Insurance Co.* (Iowa) 25 N. W. Rep. 745; *Burns* v. *Schreiber* (Minn.) 51 N. W. Rep. 120. See authorities as collated in 1 Enc. Pl. & Prac. pp. 548, 549. In this case counsel objected and took exception to the order allowing the amendment. This protest of counsel appearing of record on the face of the judgment roll, we would feel at liberty to reverse the judgment for that reason alone, aside from any question arising upon the demurrer. But the amended complaint was demurrable. It assumed to join in the complaint a cause of action for a tort with a purely equitable cause of action. The first count relates wholly to a seed lien and its foreclosure, while the second alleges a tort pure and simple. These causes of action are not such as belong to the same class, and hence cannot be united in the same complaint. See Rev. Codes, § 5291. We are unable to see why this action was commenced. It was instituted some four years after the grain on which the plaintiff claimed a lien had been shipped out of the state. The lien could not then be foreclosed by a sale of the subject matter. An action for damages could then have been maintained against all persons who wrongfully interfered with the wheat to plaintiff's damage, and in such action the plaintiff could have shown the fact that he had a lien as a basis of recovery for any conversion of the wheat. The defendants Lynch and Eddie, not having possession of the grain when the action was commenced, and never having had a lien upon the same, were improper parties to an action brought only to foreclose the lien. It follows that the judgment of the court below, in so far as it is a judgment against the defendant Ernest C. Eddie, must be reversed, and the trial court is directed to dismiss the action as to him. All the judges concurring.

(79 N. W. Rep. 441).

JOHN MCTAVISH *vs.* GREAT NORTHERN RAILWAY CO.

Opinion filed May 11, 1899.

Order for Judgment—Entry in Judgment Book.

An order for judgment duly entered in the judgment book does not constitute a judgment unless the wording be such that it expresses the final sentence of the court upon the matters contained in the record, and at once ends the case, and contemplates no further judicial action. Cameron v. Railway Co., 8 N. D. 124, 77 N. W. Rep. 1016, distinguished.

Entry Nunc Pro Tunc—Appeal.

In this state, where the entry of judgment in the judgment book constitutes the judgment, and not merely the evidence of the judgment, the entry of judgment on November 28th nunc pro tunc as

of the 17th of the preceding April cannot make effective an attempted appeal from said judgment, taken during the intervening June, in the mistaken belief that there was a judgment in the case

Negligence—Fire From Defective Engine.

When, in an action to recover damages from a railroad company occasioned by a fire which was started by one of the defendant's locomotives, the presumption of defect in the construction or equipment of such locomotive, or of negligence in its operation, which the statute raises, has been overcome by proper evidence introduced by the defendant, yet the evidence shows that the same locomotive, on the same day, and within a distance of 10 miles or less, set three different fires, it is not error to submit to the jury the question of defects in the construction or equipment of such locomotive, or negligence in its operation.

Right of Way—Combustible Material—Negligence.

Where, in such an action, negligence is also charged in permitting combustible material to accumulate on the right of way, which was ignited by sparks or fire from the locomotive thus causing the fire which occasioned the damages, it is not necessary for the plaintiff to prove title or ownership of the locus in quo in defendant. If he shows that defendant was using the ground as a part of its right of way, that will be sufficient. The use being shown, the law will presume that the right to use has been properly acquired.

Contributory Negligence Question for Jury.

Question of contributory negligence considered, and *held* properly submitted to the jury.

Appeal from District Court, Pierce County; *Morgan*, J.

Action by John McTavish against the Great Northern Railway Company. Judgment for plaintiff. Defendant appeals.

Affirmed.

W. E. Dodge and *Charles S. Albert*, for appellant.

The prima facie presumption of negligence from the setting out of the fire by defendant's engine raised by § 2984, Rev. Codes, is a disputable one and was rebutted by the facts admitted in the stipulation. *Volkman* v. *Chicago, St. P. M. & O. Ry. Co.*, 37 N. W. Rep. 731, 5 Dak. 69; *Dailey* v. *C. M. & St. P. Ry. Co.*, 43 Minn. 319; *Menominee, etc. Co.* v. *Ry. Co.*, 65 N. W. Rep. 176; *Spaulding* v. *Ry. Co.*, 33 Wis. 582; *State* v. *Hodge*, 50 N. H. 510; 2 Shearman & R. on Neg. § 676; *Carson* v. *Ry. Co.*, 29 Minn. 12; *Searles* v. *Ry. Co.*, 101 N. Y. 661; *St. L., etc. Co.* v. *Knight*, 41 S. W. Rep. 417. The evidence connecting cause and effect, in actions to recover for the negligent setting of a fire must be clear, positive and convincing. Plaintiff has the burden of showing that the fire negligently set by defendant caused his injury. *Montague* v. *Ry. Co.*, 72 N. W. Rep. 41; *Baxter* v. *Ry. Co.*, 75 N. W. Rep. 1114; *Lake Erie, etc. Ry. Co.* v. *Maron*, 47 N. E. Rep. 691; *Stratton* v. *Ry. Co.*, 42 Pac. Rep. 602; *Denver, etc. R. Co.* v. *Morton*, 35 Pac. Rep. 345; *Denver, etc. R. Co.* v. *DeGraff*, 29 Pac. Rep. 664. Plaintiff to recover must establish that there was a fire on the right of way and that it escaped therefrom. It is not sufficient merely to prove that there was fire

on the right of way. *Taylor* v. *Ry. Co.*, 34 Atl. Rep. 457. Plaintiff to recover must establish the case made in his pleadings, where the allegation is that the fire was set by sparks from a locomotive of defendant's, evidence that it was set by a fire from another field, even though occasioned by sparks from the engine will not sustain the averment. *Toledo, etc. Co.* v. *Morgan*, 72 Ill. 155; *Miller* v. *Ry. Co.*, 23 N. W. Rep. 756; *Carter* v. *Ry. Co.*, 21 N. W. Rep. 607. When a fire originates on the defendant's premises and is communicated from thence to plaintiff's premises, the complaint must allege negligence in permitting it to escape to the land of the plaintiff. The tort consists not in the defandant's setting out fire on its own premises but in permitting it to escape thereform, and the proof cannot extend beyond the averments of the complaint. *Pittsburg Ry. Co.* v. *Culver*, 60 Ind. 969; *Omaha R. Co.* v. *Wright*, 66 N. W. Rep. 842; *Pa. Co.* v. *Gallatine*, 77 Ind. 322; *Louisville R. Co.* v. *Sperm*, 87 Ind. 322; *Louisville R. Co.* v. *Ehlert*, 87 Ind. 339; *Ind. R. Co.* v. *Adamson*, 90 Ind. 60; *Ind. R. Co.* v. *McBroom*, 91 Ind. 111; *Haugen* v. *R. Co.*, 3 S. D. 294; *Weber* v. *Ry. Co.*, 65 N. W. Rep. 93; *Northern P. Ry. Co.* v. *Burke*, 44 Pac. Rep. 904. The primary cause must be the proximate cause of the injury. If because of the fire on the right of way, other persons were prompted to set out back fires for the protection of their property defendant is not liable for injuries caused by the back fires. *Marvin* v. *Ry. Co.*, 47 N. W. Rep. 1123; *Cook* v. *Ry Co.*, 14 N. W. Rep. 561; *Megon* v. *Ry. Co.*, 56 N. W. Rep. 1009; *Keslowski* v. *Thayer*, 66 Minn. 150. Where, as in this case, the court gave an erroneous instruction in regard to a vital issue and erroneously submitted an issue which ought to have been withheld from the jury, the *Ry. Co.*, 61 Minn. 441; *VanDoran* v. *Wright*, 65 Minn. 80; *Hill* error is vital. *Leitch* v. *Ry. Co.*, 67 N. W. Rep. 21; *Funk* v. v. *Trainor*, 49 Wis. 537; *Heddler* v. *Ry. Co.*, 42 N. W. Rep. 237. The instruction that defendant was bound to use the best known appliances to prevent the escape of fire was error. It imposed too high a degree of care upon defendant. *Paris, etc. Ry. Co.* v. *Nesbett*, 33 S. W. Rep. 280. The order of the District Court directing judgment to enter was not a judgment in fact or in legal effect and its entry by the clerk did not make it a judgment so as to give this Court jurisdiction on the former appeal. In re Weber, 4 N. D. 119, 59 N. W. Rep. 523; *Locke* v. *Hubbard*, 9 S. D. 364, 69 N. W. Rep. 588; *Field* v. *Elev. Co.*, 5 N. D. 400, 67 N. W. Rep. 147; *Greenly* v. *Hopkins*, 7 S. D. 561, 64 N. W. Rep. 1128; *Chamberlain* v. *Hedges*, 10 S. D. 290, 73 N. W. Rep. 75; *Coburn* v. *Commis'r's*, 10 S. D. 552, 74 N. W. Rep. 1026; 1 Black on Judgments, §3; *Whitwell* v. *Emory*, 3 Mich. 84, 54 Am. Dec. 220; *Putnam* v. *Crombie*, 34 Barb. 232; *Demens* v. *Poyntz*, 6 So. Rep. 261. The entry of judgment by the clerk is a prerequisite to the right of appeal from the judgment. *Los Angeles Bank* v. *Raynor*, 61 Cal. 145; 1 Black on Judgments, § 106. A judgment is rendered when ordered by the court and entered when actually entered in the

judgment book. The entry of an order for judgment is not the entry of judgment. *Durant* v. *Comegys*, 26 Pac. Rep. 755; *Lincoln* v. *Cross*, 11 Wis. 94; *McNevin* v. *McNevin*, 11 Pac. Coast L. Jr. 92; *Martin* v. *Barnhardt*, 39 Ill. 9; Haynes New Trials 183, n. 6; *Park* v. *Lide*, 7 So. Rep. 805; *Thomas* v. *Anderson*, 55 Cal. 43; *Schroeder* v. *Schmidt*, 12 Pac. Rep. 302; *Tyrell* v. *Baldwin*, 13 Pac. Rep. 475; *Morgan* v. *Flexner*, 16 So. Rep. 716; *Brown* v. *Hathaway*, 10 Minn. 303; *Williams* v. *McGrade*, 13 Minn. 46; *Hodgins* v. *Heaney*, 15 Minn. 185; *Hoehne* v. *Trugillo*, 1 Colo. 161; *Hunter* v. *Cleveland*, 31 Minn. 505; *Myer* v. *Tentopolis*, 131 Ill. 552; *Premt* v. *People*, 5 Neb. 377. The decision should be signed by the judge and the judgment by the clerk. *Delaney* v. *Blizzard*, 7 Hun. 66; *Rousseau* v. *Bleau*, 8 N. Y. Supp. 825.

N. A. Stewart (*Bosard & Bosard*, of counsel), for respondent.

The judgment was irregular in form, but it was sufficient in substance as it contained the final judicial determination of the action. It was duly entered, and finally determined the controversy. *Cameron* v. *G. N. Ry. Co.*, 8 N. D. 124, 77 N. W. Rep. 1017; Freeman on Judgements, §§ 47-50. Where judgment has been rendered but not entered, it may be entered nunc pro tunc, and such entry will support intermediate proceedings conformable with judgment. *Graham* v. *Lynn*, 39 Am. Dec. 493; *Todd* v. *Todd*, 63 N. W. Rep. 777; *Jones* v. *Lewis*, 47 Am. Dec. 338; *Davis* v. *Shaver*, 91 Am. Dec. 92; *Tapley* v. *Goodsell*, 122 Mass. 176. The entry of judgment nunc pro tunc is always proper when a judgment has been ordered by the court but the clerk has failed to copy it into the record. *Howell* v. *Morlan*, 78 Ill. 162; *Franklin* v. *Merida*, 50 Cal. 289; *Hansbrough* v. *Fudge*, 80 Mo. 307; *Belkin* v. *Rhodes*, 76 Mo. 643; *Aydelette* v. *Brittam*, 29 Kan. 98. Where fire has been negligently communicated to property and by subsequent agencies it is carried to other properties the party first setting out the fire will be held liable. *Poeppers* v. *Ry. Co.*, 67 Mo. 715; *Coates* v. *Ry Co.*, 61 Mo. 38; *Krippner* v. *Biebl*, 28 Minn. 139; *Atkinson* v. *Transportation Co.*, 60 Wis. 141; *Milwaukee, etc. Ry. Co.* v. *Kellogg*, 94 U. S. 169; *Henry* v. *Ry. Co.*, 50 Cal. 183. The proximate cause of damage by fire carried from one building to another through intermediate means is a question for the jury. *Adams* v. *Young*, 44 Ohio St. 80.

BARTHOLOMEW, C. J. Some questions of practice meet us on the threshold of this case, raised by respondent's motion to dismiss the appeal. The case has already been once in this Court. See 8 N. D. 94, 76 N. W. Rep. 985. At that time a motion was made by respondent to strike the statement and abstract from the files for certain alleged defects, which motion was sustained. Thereupon both parties moved to dismiss the appeal; respondent with prejudice, and appellant without prejudice. An order of this Court was entered dismissing the appeal with prejudice, unless within a specified time appellant should pay respondent a sum named to

cover the expenses of the appeal. Appellant declined to pay such sum, and the order of dismissal was made absolute. It now transpires that counsel for the appellant declined to pay the sum specified in the former order because, upon an inspection of the records in the trial court, he reached the conclusion that no judgment had ever been entered in the case, and consequently the former appeal had been prematurely taken, and the case was not properly in this Court. After the remittitur was sent down, counsel procured the entry of what he regarded as a regular judgment upon the order for judgment previously made by the District Court, and from such judgment he prosecutes this appeal. This judgment concededly includes respondent's taxable costs on the former appeal, in addition to the amount of the judgment originally ordered by the District Court. After the remittitur was sent down, counsel for the respondent procured an order directing the clerk of the District Court to enter the judgment in the case, nunc pro tunc, as of the date of the original order for judgment, which was done, and a regular judgment of affirmance was also entered on the remittitur.

Counsel for the respondent now move to dismiss this appeal, and as the first ground for the motion insist that there was a valid judgment at the time of the former appeal, and that the dismissal of that appeal affirmed the judgment, and hence this matter is res adjudicata. Counsel's conclusion is conceded if the major premise be correct. The records show that on the 27th day of April, 1898, an order for judgment was made and signed by the judge of the District Court, which, after the usual formal parts, declares: "And the court, overruling the defendant's motion for a new trial, made on the 17th day of March, 1898, orders that the plaintiff have and recover judgment against the defendant for the sum of two thousand six hundred and eighty-eight and 85-100 (2,688.85) dollars damages, and interest thereon from and after the 18th day of June, 1897, and ten dollars costs; and the clerk of the District Court is hereby ordered to render judgment accordingly." This order was, on the 11th day of May, 1898, entered by the clerk of the District Court in his judgment book, and thereafter, and on June 4, 1898, the former appeal was taken, the notice of appeal stating that the appeal was "from the judgment of the District Court entered herein on the 11th day of May, 1898." It will be seen that the precise question for determination is whether or not this order for judgment, when duly entered in the judgment book, constitutes a valid judgment, or is it so entirely void that it must be wholly disregarded as a judgment? This Court has held that there can be no effective judgment in this state until it is entered in the judgment book. In re Weber, 4 N. D. 119, 59 N. W. Rep. 523. In that case it was held that an order made in a case appealed from Justice Court, and which ordered "that said appeal be, and the same is hereby dismissed," and which was entered in full in the order book, was neither a judgment nor a final order. But the court expressly

refrained from expressing an opinion as to what it would have been had it been entered in the judgment book. This case was followed, and the principle reaffirmed, in *Field* v. *Elevator Co.*, 5 N. D. 400, 67 N. W. Rep. 147. But in *Cameron* v. *Railway Co.*, 8 N. D. 124, 77 N. W. Rep. 1016, we had a case where, in response to a motion to dismiss, an order was made and signed which declared, inter alia: "Which motion, after being duly considered by the court, is allowed, and the plaintiff's action is hereby dismissed. Done in open court," etc. This order was entered in the judgment book, and we held that it constituted a final judgment. In that case some stress was laid upon the fact that the notice of appeal referred to it as a judgment, but the same fact exists in this case. In that case the Court said: "The question is therefore presented whether this constitutes a judgment within the meaning of the law. We are constrained to hold that it does. It embraces the disposition made of the case by the court below, and that disposition is incorporated in the judgment book. The language of the judgment is, 'The plaintiff's action is hereby dismissed.' This is explicit, and is found written in the judgment book kept in the office of the clerk of the District Court." Is the point before us ruled by this case? We think not. The distinction may be fine, but it is substantial. We must by no means confound an order for judgment with the judgment proper. The former is a writing signed by the judge, particularly indicating the terms of the judgment which the law pronounces upon the matter before the court. The latter is the formal judgment of the court, entered by its ministerial officer in the judgment book. Now, it may readily be conceived that language may be used in the order signed by the judge which is in all its formal parts sufficient to constitute a judgment, yet, unless entered in the judgment book, it has no such effect. Such was the Weber case. But, if the language of the order be all sufficient to constitute a judgment, such language will, when written out in the judgment book, necessarily be a judgment; and the fact that the same language appeared in the order cannot affect the case in the least. Such was the Cameron case. It is not every order that might be entered in the judgment book that would constitute a judgment. Necessarily, we must look to the substance, and not to the form. Ordinarily, the substance of an order for judgment will not constitute a judgment. In Black, Judgm. § 115, it is said: "A true judgment must be distinguished from a mere order or direction or permission to the clerk to enter a judgment. A document of the latter kind has not the force or characteristics of a judgment, and will not support an execution." A judgment is the final sentence of the law upon the matter contained in the record. It ends the case, and leaves no further judicial act to be performed. A glance at the order in this case shows that it did not purport to be the final act in the case. It, in terms, ordered the clerk to enter judgment, which as stated, is the act of the court by its ministerial officer. It contemplated further judicial action. Again, a money judgment for plaintiff

should always adjudge or order that plaintiff do have and recover the specified amount of money. This document does not order or adjudge the recovery of any sum of money whatever. It simply orders that plaintiff do have and recover a judgment for a specified amount; in other words, it orders that plaintiff have a judgment which shall adjudge that he recover the specified amount of money. No more apt words could have been used in ordering a judgment. Reading this entire document as a whole, we are clear that it lacks the substance of a final judgment.

The second reason assigned for dismissing this appeal is the fact that the judgment appealed from was entered pursuant to the original order for judgment made by the District Court, but includes respondent's costs on the former appeal to this Court. This ground for the motion is not argued in counsel's printed brief or orally, and hence is waived, and we mention it only to say that, whatever may be the disposition of this case upon this appeal, appellant is liable absolutely for the costs upon the former appeal. The judgment of affirmance which respondent caused to be entered upon the remittitur is a valid judgment, so far as said costs are concerned; but, as it purported to affirm a judgment which it now transpires never existed, it is otherwise a nullity.

Respondent also urges as a ground for dismissing the appeal that the entry of the judgment after the remittitur went down, and on the order of the court procured November 28, 1898, nunc pro tunc, as of the date of the original order for judgment, cured any defect that might have theretofore existed, and created a judgment valid from the date of the original order, and for that reason the matter here involved is res adjudicata. A large citation of cases is presented supporting this view, and counsel, in their brief, say: "The entry of a formal judgment nuc pro tunc, where the clerk has neglected to enter the same properly, after appeal from the judgment actually rendered and supposed to be entered, covers the defect. * * * The authority of the clerk to make this formal entry is founded on a judgment already valid, and whose validity is not destroyed by his failure to enter it." This language of the learned counsel develops the principle upon which the cases that support their position is based. In many jurisdictions a judgment is rendered the moment the court, orally or otherwise, announces its definite and final determination. That announcement is the judgment. The formal entry is but the evidence of that judgment, and, of course, the formal evidence of that which exists in equal force and validity without such evidence can be entered as of any date that does not antedate the fact. In this state there is no distinction between the rendition and the entry of judgment. In re Weber, supra. The entry in the judgment book is not only the evidence of the judgment, but it is the judgment, and there can be no other valid judgment in any case. The authorities cited by counsel are not applicable here. The motion to dismiss is denied.

This action was brought to recover damages caused by a prairie

fire, which it is claimed was started by the negligence of the defendant. Damages are claimed for loss of certain property, but principally by reason of physical injuries, and sufferings, and expenses caused by being burned. The complaint alleges negligence in the equipment and operation of the engine, and also in permitting dry and combustible material to accumulate and remain upon the right of way, and in permitting the fire to escape from such right of way. The injury occurred on the 23d day of October, 1895, near the branch line of defendant's road running north, and a little west, from Rugby to Bottineau. Leaving Rugby, the first station north is Barton, the second Willow City, and the third Omemee. On said October 23d a train was being run over such branch road coming south. Soon after leaving Barton, and when between Barton and Rugby, just as the train was passing, a fire started on the east side of the track in the grass, which the section foreman on that section testifies was from one to three feet high, and very dry and combustible. The witness who was nearest the fire when it started says it started about 30 feet from the track. There was a very strong wind at the time blowing from the west,—perhaps a little north of west. There was a road or trail running along the east side of the railroad track, and at a distance varying from 100 to 150 feet therefrom. There was not then, and never had been any fire break along the east line of the right of way. With the velocity acquired by the fire in running with the wind, the road seems to have presented no obstacle to its advance. It swept across the road, and continued east over what appears to have been unbroken prairie ground. This was about 2 o'clock in the afternoon. About two or two and a half miles almost directly east from the point where the fire started the plaintiff and one Young had stopped, and put up a tent. Why they were there does not appear further than that Young testifies, "We pulled in there to feed our stock and feed ourselves." The horses had been unhitched and cared for, and soon thereafter, and while plaintiff was preparing something to eat, Young remarked that it looked like a prairie fire down towards the railroad. Just west of the tent, and running partially around it in a semicircle, was a low strip of ground, in which there was shallow water. The ground was covered with rank grass, which was dry above the water. On the west side of this low ground, and 15 or 20 feet therefrom, was a trail running north and south. A short distance north of the tent—the best evidence puts it about 15 rods—was a house, standing on an elevation, and in which was stored some grain belonging to one Cruden. In a very short time Cruden appeared on the scene with a team (five horses) and a plow for the purpose of plowing a firebreak to protect his grain from the approaching fire. Young at once went to help him, and three narrow strips were broken up west of the trail, commencing at a point south of the tent, and extending to a point north of the house. Meantime the advancing line of the fire had passed the house on the north, and moved on east. Other parties had also arrived

to aid in saving the house and grain, and they were endeavoring to set back fires to prevent the south line of the fire that was necessarily left by the advancing flames from working south onto the house and tent. The fire was getting so near, and the smoke so dense, that Cruden deemed it prudent to get his horses on the high ground near the house, where, the evidence shows, the grass was short, making the spot much safer. Just what the plaintiff was doing all this time is not entirely clear. The testimony shows that it must have been more than 30 minutes from the time they discovered the fire until plaintiff was injured, but when the first real danger appeared is not shown. It seems that when they began the plowing plaintiff watched them for some time. He then, with the aid of a pot, scooped out a hole where the water was, and got some water, and an empty sack that he wet, evidently for the purpose of fighting fire. He then stood for some time on the trail, watching the plowing. He then took the pot, and went to the water hole for more water, but as he stooped to get it the dense smoke and fire came down upon him in such a manner that he deemed his only chance of saving his life was to rush through the fire, which he did, but was badly burned in so doing. Plaintiff was 64 years old. He says he had ample time to go up to the house, or to go upon the breaking. The general situation as to danger may be understood from the language of another witness, who was in that immediate vicinity. He says: "Everybody was to look out for himself in a fire of that kind, and that was the way I figured it. I know I had all I could do to take care of myself. I came out all right." The evidence shows that the fire, when it struck the furrows, was coming almost directly from the west.

The questions of negligence and contributory negligence that so often arise in cases of this character were sharply litigated on the trial, and are presented on this appeal. Our statute (section 2984, Rev. Codes) relieves a plaintiff in actions of this character, when it appears that a fire was set by fire escaping from an engine, of the burden of showing defects in the construction or equipment of the engine, or negligence on the part of the employes. Setting the fire is made presumptive evidence of such defects or negligence. But this Court is fully committed to the principle that whether or not such statutory presumption is overcome by evidence introduced by the defendant is, in the first instance, a question of law for the Court. *Smith* v. *Railroad Co.*, 3 N. D. 17, 53 N. W. Rep. 173. And also to the further position that when the proper employes of the defendant railroad company have gone upon the stand, and testified that there were no defects in the construction or equipment of the engine, and no negligence in its operation, making their testimony at all points as broad as the presumption, then, as matter of law, such presumption is overcome. Evidence of that character was introduced by the defendant in this case. The trial court fully understood the rules of law as announced in the Smith case, supra. Nevertheless, the question of negligence in the construction, equip-

ment, and operation of the engine was left to the jury in this case upon the theory that plaintiff had not rested simply upon the statutory presumption, but had introduced affirmative testimony to show such negligence. Such testimony, it was claimed, was found in the fact that this same engine, on this same day and trip, set three different fires within a distance of 8 or 10 miles. Appellant argues that such facts cannot be received in this jurisdiction as evidence of negligence, because in the Smith case this Court said, "That locomotives in operation do emit sparks which set fires is a matter of common knowledge." That was, perhaps, an inadvertent remark, and was not necessary to the decision of the case, but, as applied to the facts of that case, it did no harm. Our statute, raising a presumption of negligence from the mere fact of setting the fire, was not then in force, and the Court was discussing the rule established by the decisions. Just preceding the quoted words the Court said, "We do not think that an inference of negligence naturally arises from the mere fact that a single fire has been started by a passing engine." Again, in that same case, it was said, "We therefore establish it as the rule in this state that the Court must, in the first instance, determine the question whether the inference of negligence arising from the mere setting out of a single fire has been fully overcome." A reading of the entire opinion will show that the Court was careful to limit the rule to cases of a single fire. We have not heretofore had ocassion to consider what presumption of negligence, if any, arises from setting repeated fires. But, if setting a single fire raises a presumption of defect in construction or equipment of the locomotive, or negligence in its operation, certainly setting repeated fires on the same day by the same locomotive makes that presumption very much stronger; and while, as we have seen, the courts have arbitrarily declared (though not very logically, in the opinion of the writer hereof) what quantum of proof would, as matter of law, overcome the presumption arising from setting a single fire, yet no court has ever presumed to make any such arbitrary declaration in cases of repeated fires. As early as the case of *Huyett* v. *Railroad Co.*, 23 Pa. St. 373, the Court said: "How is it possible for the Court to say, as matter of law, how many sparks, or how many fires caused by them, it takes to prove carelessness? * * * How can we say that the happening of several fires, all about the same time, along the line of the road, is no evidence of carelessness?" In *Railway Co.* v. *Kincaid*, 29 Kan. 654, the opinion was by Brewer, J., and approved a charge of the trial court to the effect that a single fire did not of itself prove negligence, but that from the occurrence of a series of fires of a similar nature at or about the same time, when an engine in good order, and properly handled, did not ordinarily start such fires, the jury might infer negligence. In *Henry* v. *Railroad Co.*, 50 Cal. 176, it is said: "We think there was no error in permitting proof that, prior and subsequent to the fire which produced the injury complained of, other fires were kindled by defendant's engine. The evidence was con-

fined to fires caused by the same engine in the same vicinity, and about the same time. * * * We think the evidence objected to tended to prove that the fire in question was caused by sparks from the engine, and also that there was something wrong in the management, or defective in the construction, of the engine." And see, also, *Crist* v. *Railway Co.*, 58 N. Y. 638; *Railroad Co.* v. *Schultz*, 93 Pa. St. 341; *Railroad Co.* v. *Stanford*, 12 Kan. 354; *Railroad Co* v. *Campbell*, 16 Kan. 200; *Railroad Co.* v. *Grantt*, 39 Md. 115; *Longabaugh* v. *Railroad Co.*, 9 Nev. 271. There is abundance of authority for the action of the court in submitting this branch of negligence to the jury in this case.

It is also urged that there was error in submitting the question of negligence on the part of the defendant in permitting combustible matters to accumulate upon its right of way, for the reason, as it is claimed, that there was no evidence whatever that the defendant owned any right of way at this point. This assignment cannot be sustained. That defendant owned and operated this line of road is undisputed. We cannot conceive of the existence of a railroad without some accompanying right of way. The evidence tends strongly to show that when this line of road was constructed the tract of land whereon this fire started was government land. It was taken up as a homestead some years thereafter. The statute of the United States (Act Cong. March 3, 1875; 18 Stat. 482) gave the defendant the right to claim a right of way over public lands 200 feet in width. It might not be unreasonable to presume that defendant had availed itself of this right. But this was not a question of dispute over title. Ownership was not involved. In *Gram* v. *Railroad Co.*, 1 N. D. 259, 46 N. W. Rep. 974, this Court said: "The practical question was and is whether, at the time the fire was thrown out by defendant's train, it fell upon and ignited dry grass standing upon right of way then in use as such by the defendant. It is, moreover, perfectly clear to this Court that defendant's liability for the alleged negligence does not at all depend either upon its ownership or its right to the possession of the strip of land upon which the fire originated. If, at that time, the defendant was actually using the land for its right of way purposes, it would be none the less liable, if it was a mere trespasser upon such land." In this case the man who was then section foreman on this section of the road was a witness in the case, and he testified that on the day of this fire he was engaged in burning the grass off from the right of way on the east side of the track. This he did by starting a fire along the edge of the wagon road, which we have seen ran parallel with the railroad track at a distance of 100 feet or more from the track, and permitting it to work back against the wind to the track, and he had reached a point in this work about a quarter of a mile distant from where the fire started. This shows that the defendant was using as right of way a strip 100 feet in width on the east side of the track. The duties of this witness made it incumbent upon him to know what ground was being used as right of way. He says the fire started upon the right of way.

That declaration would be incompetent to show title, but it was competent as showing what he had been instructed to burn off as right of way. We think this evidence, standing uncontradicted, warranted the jury in finding that the fire started on ground used by the defendant as right of way, and, the fact of user, being once established, the law will presume that the right to so use the ground has been properly acquired. *Glass* v. *Railroad Co.*, 94 Ala. 581, 10 So. Rep. 215; *Rafferty* v. *Railway Co.*, 91 Mo. 33, 3 S. W. Rep. 393.

It is urged that the evidence fails to establish any connection between the fire started by the defendant's engine and the fire that injured plaintiff. This contention tortures the evidence. The fire was set, and at once started, before a high wind, in the direction of the house where Cruden's grain was stored. It was never checked or stopped. Parties in the neighborhood, knowing that the grain was in danger, hurried to save it. The fire had passed the house to the north before some of them reached the place. It was in plain view all the time. It would be a mere idle waste of time in such a case to go to the railroad, and trace the track of the fire, to see that it was continuous. There can be no pretense of more than one fire except that an effort was made to back fire. But this back firing was all north or west of the house, and not west of the tent, while the fire that did the damage came almost directly from the west. No witness claims that the injury was caused by the back fires, while the evidence of Mr. Cruden for the plaintiff and Mr. Burns for the defendant make it reasonably certain that it was the main fire that did the damage. The jury was not left to conjecture.

The question of plaintiff's contributory negligence was properly left to the jury. From looking at the circumstances after the injury has occurred, it is easy, as it usually is, to see how it might have been avoided. But it cannot be said as matter of law that plaintiff did not act as an ordinarily cautious and prudent man would have acted under the same circumstances. Around the house the grass was shorter, and the position safer, and plaintiff had plenty of time to reach the house after he saw the fire coming. But, so far as the evidence bears upon the subject, it tends to show that plaintiff knew nothing of the local conditions. He and his companion, Young, were passing over the road with teams and a wagon and tent. They stopped to let the horses feed, and get something to eat themselves. They had but just stopped, when the fire was seen. Plaintiff remained in the immediate vicinity of the tent until he was injured. There is nothing to show that he knew, or had any reason to believe, that it was safer up near the house than where he was. That Cruden and those familiar with the location may have known that fact is no proof that plaintiff knew it. Nor can we say, as a matter of law, that an ordinarily cautious man may not have believed that the fire breaks that we have described would be a sufficient protection to him. This disposes of all the assignments argued by appellant in its brief or orally. We find no error, and the judgment of the District Court is affirmed. All concur.

(79 N. W. Rep. 443.)

IRA L. YOUNG *vs.* THE GREAT NORTHERN RAILWAY CO.

Opinion filed May 15, 1899.

Fires Set by Locomotive—Evidence.

This being a companion case to McTavish v. Railway Co., 8 N. D. 333, 79 N. W. Rep. 443, the damage having occurred at the same time and place, caused by the same fire, and the same questions of law being raised in this case, they are, for the reasons stated in that case, ruled in the same manner.

Evidence of Fire Breaks.

It was not error in this case for the Court to permit plaintiff to prove that after the fire defendant caused fire breaks to be constructed on both sides of its track as the statute requires they shall be constructed along the line of the right of way, for the purpose of showing what right of way had been in use by the defendant.

Appeal from District Court, Pierce County; *Morgan*, J.

Action by Ira L. Young against the Great Northern Railway Company. Judgment for plaintiff. Defendant appeals.

Affirmed.

W. E. Dodge and *Charles S. Albert*, for appellant.

Bosard & Bosard and *N. A. Stewart*, for respondent.

BARTHOLOMEW, C. J. We find no material point in this case that is not covered by the decision in *McTavish* v. *Railway Co.*, 8 N. D. 333, 79 N. W. Rep. 443. The cases are companion cases in almost every particular. The same motion to dismiss the appeal that was made in that case was also made in this case, and upon the same grounds. The records as to the procedure are substantially identical, and, for the reasons stated in the McTavish case, the motion is denied.

The action was brought to recover damages for the destruction of property by fire, which it is alleged was caused by the negligence of the defendant. It was the same fire that caused the damage in the McTavish case, and the damage occurred practically at the same time and place. This plaintiff and McTavish were together. The evidence in this case shows that McTavish was in the employ of this plaintiff. The evidence as to the origin, course, and character of the fire is practically the same in both cases. We set forth the facts in detail in the McTavish case, and shall not repeat them here, but will add that the evidence shows that the property destroyed was in the tent, and in wagons standing near the tent, except the horses, which were picketed out a short distance east of the tent. The evidence in this case that the damage was caused by the main fire, and that it swept over the furrows that were plowed as a fire break, is even stronger than in the other case. In this case there was no proof that other fires were set by the locomotive, and the Court took from the jury the question of defects in the construc-

tion and equipment of the engine or negligence in its operation, leaving only the question of negligence in permitting combustible material to accumulate upon the right of way, and in permitting the fire to escape therefrom. One point that was not treated in the McTavish case is pressed with earnestness in this case. Our statute (section 10, c. 90, Laws 1895) made it the duty of defendant to plow a fire break at the outer edge of its right of way. Now, it is urged as an indispensable element of the negligence that must exist before defendant would be liable that it must have been negligent in permitting the fire to escape from its right of way, and that there is nothing in the evidence to show that defendant did not have, at the point where this fire escaped, the fire break required by law, and hence could not have been negligent in permitting the fire to escape. It is true that there is not in this case, as there was in the McTavish case, positive and direct evidence that there was no fire break, at the time of this fire, at the point where it left the right of way. But the circumstantial evidence is so strong that the jury might reasonably have found that there was no fire break. None of the witnesses who saw the fire start speak of a fire break, but they do speak of the highway that ran on the east side of the track. The section foreman, who was that day burning the grass from the right of way on the east side, was setting his fire along this road, and letting it burn back against the wind to the track. Had there been a fire break, it would have been his duty to have burned the grass between the fire break and the track. Further, plaintiff undertook to prove, and, over defendant's objection, did prove, that after this fire occurred defendant caused fire breaks to be plowed on both sides of the track at that point, and at a distance of about 100 feet therefrom. From these facts it very satisfactorily appears that there was no fire break there at the time. But counsel contend that the Court erred in admitting the evidence of the subsequent construction of the fire break, under the decision of this Court in *Roehr* v. *Railway Co.*, 7 N. D. 95, 72 N. W. Rep. 1084. But that case was very different in its facts. There the evidence showed that at some time prior to the fire which occasioned the damage the servants of the defendant had plowed some furrows at a distance of 146 feet from the railroad track, upon land which concededly belonged to another, and which was in the inclosed possession of such other party at the time of the fire, and the fire started within such inclosure. We held, under the circumstances of that case, that plowing the furrows was no evidence of the width of the right of way, and furnished no proof that the fire started on the right of way. In this case the road was built in 1887, and had been operated since that time. The testimony tended to show that at that time the land was a portion of the public domain, and, if so, defendant might acquire a right of way 200 feet in width, under Act. Cong. March 3, 1875 (18 Stat. 482). It must have been using a right of way of some width, either as a traspasser or otherwise. The construction of fire breaks on either side of the track

at a distance of about 100 feet therefrom would indicate the use of the ground between the fire breaks for right of way purposes, and the fact that the distance of the furrows from the track might vary a few feet at different points, to accommodate the configurations of the ground, would not destroy its force in that respect. The fact that the fire break was constructed after the fire, lessons its probative force in this case, but does not entirely destroy it. Judgment affirmed. All concur.

(79 N. W. Rep. 448.)

JOHN P. BRAY *vs.* LEWIS E. BOOKER, *et al.*

Opinion filed February 16, 1899.

Vendor's Lien Waived by Taking Collateral Security.

When, upon the sale of real property, the vendor accepts the vendee's note for a portion of the purchase price, and the vendee, for the sole purpose of enabling the vendor to discount said note at the bank, gives the vendor collateral security for the payment of the note, such security is, nevertheless, given to, and for the benefit of, the vendor, and, under section 4830, Rev. Codes, no vendor's lien upon the realty can be established for the amount represented by such note.

Promise to Pay Vendor's Notes is Not Payment.

Where, upon the purchase of real property for a sum certain, the vendee agrees to pay a certain portion of that sum by paying the promissory note of the vendor held by a specified bank, such agreement or promise does not constitute payment, as between the vendor and vendee. If the promise be not performed, the debt for purchase price still exists to that extent, and the vendor may thereafter bring suit against the vendee, and have a vendor's lien upon the realty established for such unpaid portion of the purchase price, and his right to bring such action does not depend upon his precedent payment of his note to the bank, provided his obligation be still outstanding.

Husband Acting as Agent for the Wife—Notice.

A husband was indebted to his wife in the sum of $6,000. He promised to purchase a home, and place the title in her name. With her knowledge and consent, he negotiated for and purchased a house and lot, and procured the deed to be made in her name, and delivered the same to her. She received the same in actual ignorance of the terms and conditions of the purchase; but *held*, that the husband was the agent for his wife in making the purchase, and in law she is chargeable with full knowledge of the details of the transaction, and does not occupy the position of an innocent purchaser for value from her husband.

Conduct Not Amounting to Waiver of Vendor's Lien.

A vendor may waive his right to a vendor's lien by any language or conduct clearly manifesting an intention to waive the same, but such waiver cannot be presumed from the simple fact that the vendor executed the deed after the vendee had refused to mortgage the property to secure the purchase price, and had stated that he desired to receive the property free from all incumbrances.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by John P. Bray against Lewis E. Booker and Katie E. Booker, to established and enforce a vendor's lien for $8,000 and interest, pursuant to section 4830, Rev. Codes. The trial court awarded plaintiff a lien for $3,000, with interest, but held that because plaintiff had taken collateral security for $5,000 of the purchase price of the property he lost his lien to that extent. The plaintiff, Alse J. Gronna, intervener, and the defendants severally appeal.

Affirmed.

Templeton & Rex (*Tracy R. Bangs*, of counsel), for plaintiff and appellant.

The bank stock was put up to secure payment of Booker's note to the indorsee, the Merchants' National Bank, and not to Bray. This does not forfeit the right of lien. *Wilson* v. *Lyons*, 51 Ill. 166; *Carey* v. *Boyle*, 11 N. W. Rep. 47; *Barrett* v. *Lewis*, 5 N. E. Rep. 910. When the payee of a note transfers it and remains liable thereon as indorser or guarantor, if he subsequently redeems the note the lien revives. Jones on Liens, §§ 1092-1096; *Perkins* v. *Gibson*, 24 Am. Rep. 644; *Green* v. *De Moss*, 10 Hump. 371; *Kelley* v. *Payne*, 18 Ala. 371; *Rogers* v. *James*, 33 Ark. 77; *Turner* v. *Horner*, 29 Ark. 440; *Bancroft* v. *Crosby*, 74 Cal. 583, 16 Pac. Rep. 504. The lien given by Sec. 4830, Rev. Codes, should be in no way restricted by construction. § 5138, Rev. Codes. The lower court properly established a lien for $3,000, that portion of the price unpaid and unsecured. *McCauley* v. *Holz*, 62 Ind. 205. Plaintiff did not lose his right to vendor's lien because of accepting the substituted obligation of Booker to pay his obligations to the Grand Forks National Bank, and the Security Trust Company. *Turpie* v. *Lowe*, 15 N. E. Rep. 834; *Elliot* v. *Plattor*, 43 Ohio St. 198; *Ry. Co.* v. *Lewton*, 20 Ohio St. 401; *DeForest* v. *Holum*, 38 Wis. 516; *McDale* v. *Purdy*, 23 Ia. 277; *Merrill* v. *Allen*, 38 Mich. 487; *Mills* v. *Bliss*, 55 N. Y. 139; 2 Warville on Vendors, 706; *Rice* v. *Sanders*, 152 Mass. 108, 24 N. E. Rep. 1079; *Williams* v. *Crow*, 84 Mo. 298. Bray could maintain an action upon Booker's promise to make these payments, and could enforce the lien as security therefor. *Steene* v. *Aylesford*, 18 Conn. 244; *Piggot* v. *Thompson*, 3 B. & P. 149 n.; *Furnas* v. *Durgan*, 119 Mass. 500; *Locke* v. *Homer*, 131 Mass. 93; *Farnsworth* v. *Boardman*, 131 Mass. 115; *Wicker* v. *Hoppock*, 6 Wall 94; *Valentine* v. *Wheeler*, 122 Mass. 566; *Muhlig* v. *Fiske*, 131 Mass. 110; *Gaffney* v. *Hicks*, 131 Mass. 124; *Reed* v. *Paul*, 131 Mass. 129; *Coffin* v. *Adams*, 131 Mass. 133; *Williams* v. *Fowle*, 132 Mass. 385; *Pierce* v. *Plumb*, 74 Ill. 326; *Mills* v. *Allen*, 133 U. S. 423; *Anoka Lumber Co.* v. *Fidelity C. Co.*, 63 Minn. 286, 65 N. W. Rep. 353; *Churchill* v. *Hunt*, 3 Denio. 321; *Stout* v. *Foulger*, 34 Ia. 71, 11 Am. Rep. 138; *Kohler* v. *Metlage*, 72 N. Y. 259; *Connar* v. *Reaves*, 103 N. Y. 527. The bank and its receiver have by suing Bray repudi-

ated Booker's promise to pay his debt. No action would lie in favor of the bank against Booker for this debt until an acceptance of the agreement, which would amount to a consent by the bank and its receiver that Bray, the original promisee be discharged from his original obligation. *Woods* v. *Moriarity*, 9 Atl. Rep. 427; *Warren* v. *Batchelder*, 16 N. H. 580; *Bohanan* v. *Pope*, 42 Me. 93. Some word or act is essential to show an acceptance or adoption by the creditor of the substituted promise. *Dimick* v. *Register*, 9 So. Rep. 79; *Wheat* v. *Rice*, 97 N. Y. 296; *Dunning* v. *Leavitt*, 85 N. Y. 35; *Crowe* v. *Lewin*, 95 N. Y. 423; *Turk* v. *Sidge*, 41 N. Y. 206; *Moore* v. *Ryder*, 65 N. Y. 438; *Crowell* v. *Currier*, 27 N. J. Eq. 152; *Trimble* v. *Strother*, 25 O. St. 378; § 3840, Rev. Codes. But the contract was not made expressly for the benefit of the bank or the trust company, and therefore they could not maintain an action thereon against Booker. § 3840, Rev. Codes; *Pardee* v. *Treat*, 82 N. Y. 385; *Beveridge* v. *Ry. Co.*, 112 N. Y. 26. This agreement was made for plaintiff's benefit and it is not sufficient that it might incidentally benefit the third parties named. *Parlin* v. *Hall*, 2 N. D. 473; *Am. Exc. Nat. Bk.* v. *Ry. Co.*, 76 Fed. Rep. 130; *Austin* v. *Seligman*, 18 Fed. Rep. 519; *Crandell* v. *Payne*, 39 N. E. Rep. 601; *Constable* v. *Nat. Steamship Co.*, 154 U. S. 51; *Savings Bank* v. *Thornton*, 44 Pac. Rep. 466; *Wright* v. *Terry*, 2 So. Rep. 6; *Sayward* v. *Dexter, Horton & Co.*, 72 Fed. Rep. 758; *Chung Kee* v. *Davidson*, 15 Pac. Rep. 100. The burden is upon defendants to prove waiver, if in doubt the court should sustain the lien. *Crampton* v. *Prince*, 3 So. Rep. 519; *Manley* v. *Slason*, 21 Vt. 271, 52 Am. Dec. 60; *Wilson* v. *Lyon*, 51 Ill. 166; Story Eq. Jr. § 1224; *Maroney* v. *Boyle*, 141 N. Y. 462, 36 N. E. Rep. 511. No consideration moved from Mrs. Booker to the plaintiff, she was not a bona fide purchaser for value, but a mere volunteer, and plaintiff can enforce his lien against the property. *Pylant* v. *Reeves*, 25 Am. Rep. 605, 53 Ala. 132; *Crampton* v. *Prince*, 3 So. Rep. 519, 3 Am. St. Rep. 718; *Davis* v. *Smith*, 7 So. Rep. 159; *Davenport* v. *Murray*, 68 Mo. 198; *Pratt* v. *Eaton*, 65 Mo. 157; *Hunt* v. *Marsh*, 80 Mo. 396; *Williams* v. *Crow*, 84 Mo. 298. The fact that Bray deeded to Mrs. Booker, at the request of her husband, with whom the contract was made, does not alter the situation. Jones on Liens, § 1084; *Taylor* v. *Alloway*, 3 Litt (Ky.) 216; *Davis* v. *Pearson*, 44 Miss. 508; *Humphrey* v. *Thorne*, 63 Ind. 296; *Baker* v. *Gilbert*, 93 Ind. 70; *Burgers* v. *Fairbanks*, 23 Pac. Rep. 292.

John A. Sorley, also *Cochrane & Corliss*, for respondents and intervener.

Bray discounted the $5,400 note to the Merchants' National Bank. He transferred the note absolutely and not by way of pledge, and thereby destroyed his lien to this extent. § 4831, Rev. Codes; *Moshier* v. *Meek*, 80 Ill. 79; *Elder* v. *Jones*, 85 Ill. 384. A vendor's lien has never been placed upon any substantial basis of principle. 2 Jones on Liens, § 1063; 28 Am. & Eng. Enc. L. 159; *Frame* v. *Sliter*, 45 Pac. Rep. 290. A vendor's lien cannot be assigned. 2

Jones on Liens, § 1092. The taking of additional security waives the lien. 2 Jones on Liens, § 1086. It is such an insubstantial and shadowy equity that the lien of a subsequent creditor will prevail against it. *Bayley* v. *Greenleaf*, 7 Wheat. 46; *Meckreth* v. *Symmons*, 1 Lead. Cases in Eq. 373; *Bray* v. *Booker*, 6 N. D. 526. The lien is opposed to the general policy of our registration statutes. Pomeroy Eq. § 1250 and n.; 2 Jones on Liens, 1063; *Frame* v. *Sliter*, 45 Pac. Rep. 290; *Hammond* v. *Peyton*, 27 N. W. Rep. 72. It would seem therefore that one who asserts a vendor's lien is not entitled to any special favor from the courts. *Kauffelt* v. *Bower*, 7 Serg. & Rawle, 64. Real and personal property were sold together for a lump sum. No price was agreed upon for the real estate, hence it cannot be determined for what sum a lien can be allowed. 2 Jones on Liens, § 1072; *Stringfellow* v. *Joe*, 73 Ala. 207; *McCandlish* v. *Keen*, 13 Grat. 615; *Peters* v. *Tunell*, 43 Minn. 473; *Griffin* v. *Byrd*, 19 So. Rep. 717; *Wilkinson* v. *Palmer*, 83 Ala. 367; 28 Am. & Eng. Enc. L. 166. Plaintiff took in place of $3,000 cash Booker's promise to pay the debts of Bray owing to the Security Trust Company and the Grand Forks National Bank. A vendor's lien cannot be sustained as security for this substituted obligation. 2 Jones on Liens, § 1074; 3 Pom. Eq. Jr. 1252; *McKillip* v. *McKillip*, 8 Barb. 552; 2 Devlin on Deeds, § 1256; 1 Lead. Cas. in Eq. 355; *Paterson* v. *Edwards*, 29 Miss. 71; *Chapman* v. *Beardsley*, 31 Conn. 115. When as part of the transaction Booker agreed to pay the notes held by these corporations against Bray, he became liable therefor under the rule that a third person may sue upon such a promise as being made for his benefit. *Wager* v. *Link*, 150 N. Y. 549; *Alvord* v. *Spring Valley*, 40 Pac. Rep. 27; *Williams* v. *Zaftzer*, 37 Pac. Rep. 411; *Keller* v. *Ashford*, 133 U. S. 622; *Moore* v. *Booker*, 4 N. D. 543; *Dean* v. *Walker*, 107 Ill. 540; *Pugh* v. *Barnes*, 19 So. Rep. 370; *Redelsheimer* v. *Miller*, 107 Ind. 485. In California under a statute similar to § 3840, Rev. Codes, it is held that the assumption by a person of a debt owing to a third party renders the promisor liable to such third party for the debt. *Williams* v. *Zaftzer*, 37 Pac. Rep. 411; *Alvord* v. *Spring Valley*, 40 Pac. Rep. 27. A lien cannot be established as security for damages resulting from a breach of a covenant made by the vendee. *Whitely* v. *Central Trust Co.*, 76 Fed. Rep. 74; *Peters* v. *Tunell*, 43 Minn. 473; *Harris* v. *Haine*, 37 Ark. 348; *Arlin* v. *Brown*, 44 N. H. 102; *Chapman* v. *Beardsley*, 31 Conn. 115; *Patterson* v. *Edwards*, 29 Miss. 71. And where the vendor accepts as part of the purchase price the promise of the vendee to pay to third persons debts owing them by the vendor, no lien exists. *Patterson* v. *Edwards*, 29 Miss. 71; *Chapman* v. *Beardsley*, 31 Conn. 115; *Harvey* v. *Kelly*, 93 Am. Dec. 267; 28 Am. & Eng. Enc. L. 165. Any conduct which evinces a purpose not to look to the land for payment is sufficient evidence of waiver. *Orrick* v. *Durham*, 79 Mo. 174; 2 Jones on Liens, § 1073; 2 Warville on Vendors, 713; *Moshier* v. *Meek*, 80 Ill. 79. Taking collateral for a portion of

the purchase price is fatal to a claim of a vendor's lien, not only for the portion secured but also for the remainder. 1 Lead. Cas. in Eq. 356; 2 Jones on Liens, § 1087; *Bond* v. *Kent*, 2 Vern. 281; *Orrick* v. *Durham*, 79 Mo. 174; *Briscoe* v. *Callaghan*, 77 Mo. 134; *Calaiborne* v. *Castle*, 32 Pac. Rep. 807. Mrs. Booker was a bona fide purchaser and took the land free of any lien. *Wert* v. *Naylor*, 93 Ind. 431; *Adams* v. *Vanderbeck*, 47 N. E. Rep. 24; *Butterfield* v. *Pitcher*, 36 N. J. Eq. 482; *Bunn* v. *Schnellbacher*, 45 N. E. Rep. 227; *Adams* v. *Vanderbeck*, 45 N. E. Rep. 645; *State Bank* v. *Franle*, 20 S. W. Rep. 620; *Heath* v. *Selverthorn*, 39 Wis. 146; *Mayer* v. *Heidebach*, 123 N. Y. 332. The real party in interest is the Merchants' National Bank and not Mr. Bray in whose name the action is being prosecuted. *Elder* v. *Jones*, 85 Ill. 384, 387.

BARTHOLOMEW, C. J. This action was brought to establish and forclose a vendor's lien, in the amount of $8,000, upon a house and lot in the City of Grand Forks. There was a decree establishing the lien to the extent of $3,000 and no more. All the parties appeal,—plaintiff because the lien was not established for the full amount claimed; and defendants and the intervener because a lien was established for any amount. The defendants and intervener first perfected their appeal, and will be known as appellants in this Court. The intervener may, for convenience, be dropped from our consideration. He was a subsequent vendee, and took with full knowledge of all of respondent's rights in the property, if he have any such rights. There is no very serious conflict in the testimony, and we may make a general statement of facts, leaving the controverted points for special mention when reached.

On and prior to September 31, 1895, the respondent, Bray, was the owner in fee of the real estate in question; also of some household furniture in the house; and of 82 or 83 shares of stock of the Grand Forks National Bank, of the face value of $100 per share. The appellant Katie E. Booker was the wife of the appellant Lewis E. Booker. Said Lewis E. Booker was the president of said Grand Forks National Bank. He was indebted to Katie E. Booker in the sum of $6,000; that sum having been placed in his hands as trustee for his wife soon after their marriage, in 1873. At one time that money had been invested in a home at Pembina, in this state. That home was sold, with the understanding that a new home should be acquired, and the title placed in Mrs. Booker. On said September, 31, 1895, and as a result of negotiations that had been pending for some days between the respondent, Bray, and appellant Lewis E. Booker, Bray sold to Booker the said house and lot; also the furniture in the house, which was valued at $600; and also the shares of stock of the said Grand Forks National Bank owned by Bray. For this property Booker agreed to pay as follows: He would execute to Bray his promissory note for $5,000, due in one year; he would pay two certain notes held by the Security Trust Company against Bray, aggregating $800, without counting accrued interest, and also two promissory notes held by the Grand

Forks National Bank against Bray, aggregating $5,750, without counting accrued interest,—making the total consideration $11,550, with whatever interest may have been accumulated on the notes. Bray was anxious to negotiate the note that he was to receive from Booker, and testifies that he would not have made the trade unless he could negotiate the note. Booker undoubtedly knew that fact. A few days before the deal was consummated Bray called upon one McLaurin, who was cashier of the Merchants' National Bank of Grand Forks, and asked him if be would discount Booker's note for $5,000. McLaurin replied that he would not. Subsequently Bray asked him if he would discount Booker's note for $5,000 if he (Bray) would guaranty it. McLaurin replied that he would not. At that time Mr. Bray informed the cashier how he expected to obtain Booker's note, and McLaurin suggested that, if Booker would give a mortgage on the real property securing the note, he (McLaurin) would discount it. This fact was communicated to Booker, but he refused to give any mortgage, but stated that he would turn over, as collateral to said note, stock of the Grand Forks National Bank owned by him of the face value of $5,000. This fact was, in turn, communicated to McLaurin, who said he would discount the note thus secured, and thereupon the deal was closed. Booker executed his note for $5,000, payable to Bray, and delivered to him the certificates of bank stock, as agreed, as collateral thereto; and also delivered to Bray a writing whereby he assumed the payment of the notes, as herein recited. At the request of Lewis E. Booker, the deed for the real estate was made direct to Katie E. Booker, the consideration therein being stated at $8,000. Bray delivered to Booker his certificates of bank stock. The next day Bray presented said note, with the collateral, at the Merchants' National Bank, and delivered the note, indorsed in the usual course of business, and the collaterals, to the cashier, McLauren, who discounted the same, and paid Bray the cash thereon. Katie E. Booker knew beforehand that her husband was negotiating with Mr. Bray for the purchase of this real estate for her and as a home, but had no knowledge, when the deed was delivered to her by her husband, of any of the terms of the purchase, or that the property was not fully paid for. Lewis E. Booker paid the notes held by the Security Trust Company against Bray, but failed to pay the notes held by the Grand Forks National Bank against Bray, either in whole or in part. At the maturity of said notes, Bray gave his own note in renewal thereof, and Lewis E. Booker guarantied the payment in writing on the back of the note. As to the bank, Bray was the principal debtor, but, as between Bray and Booker, the latter was the principal debtor. Soon after this transaction the Grand Forks National Bank was placed in the hands of a receiver, where it still remains. Such receiver has brought suit against Bray alone to recover the amount of said note. Neither did Booker pay the $5,000 note nor any part thereof. Shortly before the institution of this suit, Bray took up said note by giving the Mer-

chant's National Bank his own note therefor, and it is one of the evidences of indebtedness upon which he bases his right of recovery.

We address ourselves first to plaintiff's appeal, and in considering it we assume that the price of the real estate, as fixed by the parties in their negotiations, was $8,000. In so far as this purchase price was represented by the note for $5,000, the trial court refused to establish a vendor's lien, upon the ground that the vendor had taken security other than the personal obligations of this vendee. Section 4830, Rev. Codes, reads: "One who sells real property has a special or vendor's lien thereon, independent of possession, for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer." There is no question of law involved in this branch of the case. Counsel for respondent frankly concede that, if he accepted security upon the note, he waived the right to a vendor's lien. But they insist that, under the facts as stated, he never accepted or received any security, that the bank stock which was pledged as collateral to the notes was so pledged solely at the request and for the benefit of the Merchants' National Bank; that the collateral was in fact received by the bank; and that, if it passed through respondent's hands, it was simply in his capacity as agent for the bank. To this we cannot accede for a moment. Booker was not buying any property from the bank. He owed it no debt. It was a matter of entire indifference to him whether his note was negotiated or not. Its negotiation would not benefit him. Not so with Bray. He wanted cash. He testifies that he would not make the trade until he knew he could discount the note, and that he could not discount it unless it was secured. In other words, the effect of his testimony was that he offered to sell his property at a certain price, and accept a note for part of the purchase price, provided the note was secured, and Booker accepted his terms. We do not discover how it could possibly make any difference in the legal effect of the transaction whether Booker knew or did not know why Bray wanted the security,—whether to enable him to discount it, or for greater security in his own hands. In this instance, he did know it. But suppose all the facts to have existed just as they did exist, with the exception that Booker knew nothing of Bray's efforts to discount the note. The security would have been given for the same purpose, in either case, *i. e.* to enable Bray to negotiate the note, and would have been given for the same reason in either case, *i. e.* because the bank refused to discount the note unless it was secured. The security would be given at the demand of the bank, or for the benefit of the bank, just as much in the one case as the other. Yet it would be almost absurd to say that Booker gave the security to the bank when he was ignorant of the contemplated negotiation. Bray himself received the security, and he received it for his own bene-

fit, and that benefit he received when he presented the note and security at the bank's counter, and received the cash thereon. While these indisputable facts exist, it is idle for a witness to testify to the conclusion that the security was given at the request and for the benefit of the bank. We are entirely clear that the trial court was correct in holding that the respondent had received security for the note in question "otherwise than by the personal obligation of the buyer." This view disposes of plaintiff's appeal, and renders it entirely unnecessary for us to discuss that very interesting question, so ably presented by counsel, whether or not a vendor of realty, who takes a promissory note from the buyer and regularly transfers the same to a third party by indorsement, can by subsequently taking up the note, establish a vendor's lien for the amount upon the realty sold.

The defendant's appeal is much more involved. A question of fact meets us at the threshold of its consideration. In the transaction, was any definite price fixed upon the realty? Appellants contend that there was not, but that the real estate and bank stock were sold for a lump sum, and that, as no price was fixed upon the realty, no vendor's lien can be established against the same for any sum whatever. This contention is based upon the rule announced in 2 Jones, Liens, 1072, and 28 Am. & Eng. Enc. Law, 166. But we reach the conclusion that the rule is not applicable in this case. The evidence concerning the price fixed upon the realty is very evenly balanced. The respondent testifies with positiveness and repeatedly that it was fixed at $8,000. In this he is corroborated by the fact that such was the consideration named in the deed. Appellant Lewis E. Booker testifies that no price was fixed on the realty; that it was a lump sale for a lump sum. Proof was also introduced of an alleged admission made by respondent that such was the case. But admissions of this character constitute a weak class of evidence, depending, as they do, upon the recollections of spoken words, and are always received by a chancellor with caution. This is peculiarly an instance where the decision of the trial judge, before whom the witnesses appeared, should have weight in this Court. We accept that court's finding upon this point.

But, accepting it as a fact that the price of the realty was fixed at $8,000, appellants say that $5,000 thereof was represented by the note already disposed of, and that for the remaining $3,000 respondent accepted the promise of Lewis E. Booker to pay certain of respondent's outstanding indebtedness, and that, if Booker has failed to pay such indebtedness, respondent has his right of action against him for breach of contract, but that his recovery would sound in damages, and would not represent purchase price that could support a vendor's lien. In support of this position, we are cited to *McKillip* v. *McKillip*, 8 Barb. 552. There is perhaps a little broad language on page 560, but the case was this: In consideration of the conveyance of certain real estate, the grantee executed his bond conditioned for the support of the grantor and his son. After

the death of the grantee, an action was brought against his estate upon the bond, by one who had furnished support to the grantor and his son, to recover the value of such support, and establish the same as a vendor's lien upon the real estate transferred. The lien was denied, and correctly so, under all the authorities. In no case has a vendor's lien been established when the vendee, as the consideration for the transfer, has undertaken to perform some act beneficial to the grantor, but the value of which was uncertain or shifting. The lien extends only to purchase price, and cannot exist where no purchase price is definitely fixed in money. The lien, if established at all, must be established for so much money. If the consideration be payable in any commodity other than money, no lien can attach. 3 Pom. Eq. Jur. § 1251; 28 Am. & Eng. Enc. Law, 165; *Hudelson* v. *Wilson*, 40 Ill. App. 29. In this case the consideration was the grantee's promise to act as minister in a certain church. *Peters* v. *Tunell*, 43 Minn. 473, 45 N. W. Rep. 867. Here a portion of the consideration was the support of the grantor. *Harris* v. *Hanie*, 37 Ark. 348. In this case the consideration was cotton to be delivered. *Arlin* v. *Brown*, 44 N. H. 102. This was also a case where the consideration was the future support of the grantor. This is undoubtedly the general rule, with a possible exception in Alabama. *Coal Co.* v. *Long*, 91 Ala. 538, 8 So. Rep. 765. The courts have never confounded purchase price with damages for breach of a covenant that has been accepted as consideration for the grant. To what extent will this principle aid appellants?

A proper answer to this interrogatory requires a consideration of several other principles. In this case the entire consideration was money, and there was no indefiniteness as to the amount. For the purpose of the point we are now considering, Lewis E. Booker owed the respondent $3,000 as a part of the purchase price of said real estate. He promised to pay that indebtedness in a certain manner, to-wit: by paying respondent's indebtedness to that amount to the Grand Forks National Bank. He failed to keep his promise. In cases of this character, courts of equity have not generally made the technical discrimination between purchase price and damages that they have when the promise was to do some act of uncertain value; and for the very good reason that, in cases of this class, the damages for the breach are always and necessarily, in legal contemplation, measured by the amount which the grantee promised to pay, and did not; and, as the unpaid purchase price and the damages must be the same in every case of this kind, a court of equity, recognizing the injustice of permitting a grantee to hold the real estate without paying for it, is not inclined to permit him to reap any advantage from what, at most, is but a barren technicality. See 2 Warv. Vend. 706; *Elliott* v. *Plattor*, 43 Ohio St. 198, 1 N. E. Rep. 222; *Rice* v. *Sanders*, 152 Mass. 108, 24 N. E. Rep. 1079.

But there is another, and, to us, more satisfactory, ground upon which a vendor's lien, to the extent of $3,000, may be upheld in

this case. What was the legal effect of the promise of Lewis E. Booker to pay respondent's notes? It must be remembered that he owed the respondent, and that this was not a case of novation, where the bank accepted Booker as paymaster and released respondent. The bank was not a party to the transaction. Booker promised to pay his debt to respondent in a particular manner. But it was only a promise. It was not payment. Had he promised respondent, in form of a promissory note, to pay the debt at a future day certain and failed to pay when time for performance arrived, respondent would not have sued in damages for breach of contract, but would have sued upon the original debt, which the promise did not extinguish, but of which it was the evidence. Upon what logic did his promise to pay to a third party at a future day extinguish the debt? Appellants will say because such third party might adopt and enforce said promise at any time before it was rescinded by the original parties. That is true, under our statute. Rev. Codes, § 3840; *Moore* v. *Booker*, 4 N. D. 543, 62 N. W. Rep. 607. As the matter is here governed by statute, we need not cite the cases where this has been held as a common-law doctrine. Some of them are cited in *Moore* v. *Booker*, supra, and they show that the promise is simply the agreement of the promisee to pay his own debt in a particular manner. Our statute is the same as that of California; and see *Williams* v. *Naftzger* (Cal.) 37 Pac. Rep. 411; *Alvord* v. *Gold Co.* (Cal.) 40 Pac. Rep. 27. Very many of the cases where this question has arisen are cases where a deficiency judgment has been sustained against a grantee, who assumed and promised to pay an existing incumbrance upon land conveyed to him. The amount thus assumed having been deducted from the purchase price, in the payment to the grantor direct, the courts say that it represents a portion of the purchase price due to the grantor, and which the grantee has promised to pay in a particular manner, and in paying it he pays his own debt as well as that of the grantor. But this could not be if his own debt were extinguished by the promise. In this case $3,000 of the purchase money was not paid to the grantor direct, but was to be paid to another party; but it nevertheless represented purchase money and Lewis E. Booker's indebtedness to respondent. But it is urged that, as the third party might enforce this promise as against Booker, necessarily respondent cannot enforce it, as he cannot be liable to two distinct parties on the same obligation. This needs some qualification. Until the time for performance has arrived, of course respondent could not sue for the debt, because he had agreed to wait until that time. But thereafter, if the debt be not paid in fact, we know of no principle that would prevent his enforcing it. While the third party may adopt and enforce the promise, it is under no obligation to do so. It is under no obligation to, in any manner, recognize the agreement between respondent and Booker. It may lawfully refuse to accept performance from Booker. Should it do so, or, as suggested in *Pierce* v. *Plumb*, 74 Ill. 326, should it

generously forgive respondent's debt, what, upon appellants' theory, would be respondent's position? He could not sue for breach of contract, because Booker was ready to perform. He could not sue upon the original indebtedness, because that was entinguished by the promise. The vendee would escape payment entirely. Of course, that is not the law. In *Steene* v. *Aylesworth,* 18 Conn. 244, the syllabus reads: "Where a promise is made to one person for the benefit of another, a suit may be maintained thereon either by the promisee or the person for whose benefit the promise is made." *Locke* v. *Homer,* 131 Mass. 93, is a very instructive case. The grantors sold the property for $6,000, of which amount $2,000 was paid direct to the grantors, and $4,000 was to be paid by the assumption of grantor's mortgage debt on the premises. The mortgage not being paid, the property was sold thereunder for less than $1,000. Thereafter the grantors, without paying the balance of the debt, brought suit against the grantee to recover such balance, and the action was sustained. See, also, *Farnsworth* v. *Boardman,* Id. 115; *Reed* v. *Paul,* Id. 129; *Pierce* v. *Plumb,* 74 Ill. 326. But it is said that the third party may have notified the promisee of its intention to enforce the promise against him, even after the time for performance had passed, and that hence he could not safely pay to the original promisor. It is a sufficient answer to say that he can be required to pay but once, and he can always protect himself by an interpleader. We do not hold that mere notice by the third party in any instance would be sufficient to charge the promisee in case he thereafter dealt with the promisor. It is urged, however, that in this case the third party has in fact undertaken to enforce the promise. It is true that the receiver of the Grand Forks National Bank undertook to intervene in this case. *Bray* v. *Booker,* 6 N. D. 526, 72 N. W. Rep. 933. But the complaint in intervention in that case manifests no intention to hold Lewis E. Booker upon his promise to pay to the bank. It asks judgment against the respondent, Bray, for the amount of his renewal note to the bank, and asks that a vendor's lien be established upon the realty for the amount of such judgment. This was asked upon the theory that the bank had the right to be subrogated to any rights respondent might have to a vendor's lien, because respondent had agreed that a certain portion of the purchase price might be paid by Booker to the bank. Had such lien been established, it would have been inimical to the interests of Katie E. Booker, but there was nothing whatever asked by the receiver as against Lewis E. Booker. Nor does the entire record in the case disclose that the bank or its receiver has at any time, or in any manner, notified Booker that it would enforce his promise made for its benefit. It is proper here to say that the only question before us upon the former appeal related to the right of the receiver to intervene. It was not the intention of the Court to say anything affecting the reciprocal rights and obligations of respondent and Lewis E. Booker. Any language in our former opinion having that tendency is obiter merely.

We reach the conclusion that the promise made by Lewis E. Booker to pay a portion of the purchase money to the Grand Forks National Bank did not, without performance, extinguish his debt to respondent, and that, the time for performance having passed, respondent may bring his action upon the original purchase-price indebtedness that Booker promised to pay to the bank, and in such action he will be entitled to have a vendor's lien established, and that his right so to do does not depend upon his having paid the bank, so long as his obligation so to do remains outstanding. There are two cases, however, cited by appellant, that seem to be so directly against our holding that we desire to notice them. The first is *Patterson* v. *Edwards,* 29 Miss. 67. In that case a demurrer to the complaint was sustained. The complaint stated that plaintiff "sold and conveyed certain lots in Yazoo City to Richard Edwards, for the consideration of some $10,000 cash, then paid, and that said Edwards would take up and deliver to complainant two certain notes due to the Planters' Bank, and payable the 26th of February, 1840." Edwards failed to pay the notes, and, without paying them, Patterson brought suit for the amount, and sought to establish a vendor's lien upon the lots. The difference between that case and the case at bar is not great, but it is vital. Here the consideration was $8,000 in money. In the case in Mississippi, the consideration was $10,000 in money and the taking up of the notes. In other words, by the express terms of the contract, the promise was made and accepted as a part of the purchase price. The grantor was paid by the promise, and no debt for purchase money could remain, only an action for damages for breach of promise. The second case is *Chapman* v. *Beardsley,* 31 Conn. 115. There we find the same condition that existed in *Patterson* v. *Edwards,* supra. So far as the record shows, no price whatever was fixed upon the realty. The sole consideration was the assumption of certain claims against the grantor. The Court say that the grantee did not hold subject to any vendor's lien in favor of the vendor, because no *money* was to be paid to *him*; that the consideration was the *assumption* of other claims (we use the Court's italics); and they cite, as the only authority upon which they base their decision, *Meigs* v. *Dimock,* 6 Conn. 458, where the consideration for the conveyance was an agreement for support. We do not think either of these cases, properly construed, is at variance with our conclusions herein.

We must not be understood as deciding in this case that the promise made by Lewis E. Booker to respondent to pay a certain portion of the purchase price to the bank, in extinguishment of respondent's debt, is a contract that comes within the provisions of our Code, as having been "made expressly for the benefit of a third person." We assume in this case, against respondent's interests, that the promise comes within the statute.

The point is made that respondent intentionally waived his right to a vendor's lien. We do not so understand the facts. Of course, the lien may be waived by any act or declaration of the vendor

clearly evincing a manifest intention so to do. But the circumstances must certainly be exceptional if a waiver can ever be inferred from his silence, and that is all we have in this case, except the fact that the vendor executed the deed after Mr. Booker had expressly refused to give a mortgage on the property, and after he had stated that he desired to turn the property over to Mrs. Booker free from all incumbrances. But these were simply declarations of the vendee, to which some affirmative response must have been made by the vendor before any of his rights can be concluded thereby. Nor did taking collateral security for the payment of a portion of the purchase price work a waiver by the vendor of a lien for the part not so secured. It is true that it has been held that taking security for a portion of the purchase price evinced an intention to waive the security for the balance. See Jones, Liens, § 1087; *Orrick* v. *Durham*, 79 Mo. 174, and cases there cited. But our statute (section 4830, Rev. Codes) settles the matter in this state. It gives the vendor a lien "for so much of the price as remains unpaid and unsecured otherwise than by the personal obligation of the buyer."

One further point is made to the effect that Katie E. Booker was a bona fide purchaser for value, without notice that the purchase price was unpaid. This we regard as untenable. Mrs. Booker took her title direct from the respondent. She knew that her husband had acted as her agent in purchasing the property. She testifies: "I never had any talk myself with Mr. Bray in regard to deeding the property to me. I never had any negotiations at all myself. All the business was done by my husband with Mr. Bray. During the time of the negotiations between my husband and Mr. Bray, Mr. Booker told me nothing in regard to those negotiations, only that he was going to buy, and was dealing with Mr. Bray. I intrusted the whole matter to Mr. Booker, and relied on him, and on what he told me in regard to it." It was a clear case of agency. The knowledge of the agent was the knowledge of the principal. In law, Mrs. Booker is charged with a knowledge of all the details of the transaction.

We reach the same conclusions that were reached by the trial court, and the judgment of that court is made the judgment of this Court, and is in all things affirmed. All concur.

ON REHEARING.

A rehearing was ordered in this case upon the petition of defendants and intervener, and an argument has been presented, two points in which require discussion. We notice, first, the point that, conceding that defendant Lewis E. Booker was the real purchaser, yet plaintiff waived his vendor's lien. This claim is based upon the proposition stated in the original opinion that Mr. Booker refused to mortgage the land, and stated to Mr. Bray, during the negotiations, that he desired to turn the property over to Mrs. Booker free of all incumbrances. We used that language because we desired

to give the defendants the benefit of all that they could claim from their testimony. Mr. Booker stated in his evidence that during the negotiations, and when he refused to give a mortgage to secure the note for $5,000, he gave, as one of his reasons therefor, that he desired to turn the property over to Mrs. Booker free from incumbrances. Regarding this statement as necessary, in connection with Bray's subsequent execution of the deed, to constitute a waiver of a vendor's lien, and the burden being upon defendants to establish such waiver, the statement does not stand proven, as will appear by the testimony that we shall quote upon the next point. But, regarding the statement as proven, learned counsel insist that where, to the knowledge of the grantor, real property is purchased for the purpose of transferring it to a third party, free and clear of incumbrances, by giving a deed under such circumstances the original grantor waives his right to insist upon a vendor's lien. Counsel cite, in support of this position, *Sullivan* v. *Ferguson,* 40 Mo. 79; *Christy* v. *McKee,* 94 Mo. 241, 6 S. W. Rep. 656; and *Railway Co.* v. *Stewart,* 51 Ark. 285, 10 S. W. Rep. 767. Counsel mistake these authorities. In each case the Court was discussing the old mooted question (happily settled by statute in this state) whether or not taking the obligation of a third party was a waiver of the lien, and it was held that, where property was purchased in the manner and for the purpose stated by counsel in this case, taking the obligation of a third party was a waiver of the lien. Counsel also cite two Alabama cases,—*Hubbard* v. *Buck,* 98 Ala. 440, 13 So. Rep. 364, and *Scheerer* v. *Agee,* 106 Ala. 139, 17 So. Rep. 610. These authorities would, to some extent, support the position of counsel, if it were true here, as it is in Alabama, and in all jurisdictions where the matter is not fixed by statute, that a vendor's lien is a mere creation of equity, given by reason of the injustice of permitting one to enjoy property without paying therefor, and never allowed where the facts surrounding the transfer make it clear that the vendor does not intend to rely upon a vendor's lien. The taking of other security was such persuasive evidence that the vendor did not intend to rely upon his lien that, after much hesitation by the courts, the rule finally became nearly generally established, in the absence of statutes, that taking other security, if only the personal obligation of a responsible party, was a clear manifestation of an intent not to rely upon a vendor's lien. No doubt courts might regard other facts as manifesting the same intent, and where a vendee purchased for a certain declared object, which would be entirely subverted by the enforcement of a lien, it might not be inconsistent for a court to declare that the vendor did not intend to rely upon a lien.

But the cases that discuss the existence or nonexistence of a vendor's lien from the standpoint of the vendor's intentions have no application in this state. Here it is a question of the existence or nonexistence of the conditions prescribed by the statute. If those conditions exist,—and confessedly, for the purpose of this point in

this case, they do exist,—then the lien exists every time, and the law knows no implied provisos. Had the legislature intended that the vendor should have a lien for unpaid and unsecured purchase price in all cases unless the vendee, to the vendor's knowledge, desired to transfer the property to a third party free from incumbrances the statute would have so declared. But there is no such limitation. The statutory right is absolute, and no court can ingraft implied limitations without throwing us back upon the old equity doctrine of intention. Of course, since the lien is for the benefit of the vendor, he may, as we said in the original opinion, waive the same. But such waiver must be by unmistakable words or acts. The law cannot imply it without destroying itself. And certainly the act of giving the deed—the very act which perfects the right to the lien—cannot be regarded as an express waiver of the lien. It is suggested that where the vendee refuses to give a mortgage, and states that he desires to transfer the property free from incumbrances, if then the vendor is permitted to enforce a lien upon the property it works a fraud upon the vendee. But this is not correct. There can be no legal fraud. If the purchase price be not paid or secured, the statute creates the lien. It exists as certainly as if the grantee had executed a mortgage. This he is bound to know. The grantor may or may not rely upon or enforce it, but it exists. If the grantee wishes to avoid it, he must secure an unmistakable waiver.

But learned counsel rely more especially upon another point. In the original argument, it was claimed that Mrs. Booker occupied the position of an innocent purchaser for value, and that no lien could be enforced as against her. We held, however, that, in making the purchase, Mr. Booker, with the knowledge and consent of his wife, acted as her agent, and that she was chargeable with knowledge of the fact that the purchase money had not been paid. Counsel now say that this is correct, and that, since Mr. Booker was the agent and Mrs. Booker was the principal, she, and not he, was the "buyer," within the terms of the statute, and, as plaintiff accepted Mr. Booker's obligations for the payment of the purchase price, that he accepted security "other than the personal obligation of the buyer," and hence, under the statute, as well as under the general current of authority in the absence of statute, no vendor's lien could exist. This contention certainly has the merit of great plausibility, but it is unsound, under the facts of this case. In the original opinion, we were fixing the relations between Mr. and Mrs. Booker. It was there contended—and it was the only ground upon which a claim that she was an innocent purchaser could be based—that in effect, under the facts, she was a purchaser from Mr. Booker; that he purchased from plaintiff, and she purchased from him. We held, under the clear language of her testimony, that she did not occupy the position of a purchaser from her husband, but as to her he acted as an agent in the purchase of the property. But whether, as between plaintiff and Booker, the latter acted, or

claimed to act, as agent for his wife, or was so regarded or treated by either party, is an entirely different question. This transaction must be viewed as the parties viewed it when it was made. Counsel, in their petition for a rehearing, very properly say: "If this were a case where the husband were the real purchaser, and merely had the title put in his wife's name for convenience, then, accepting his note would not be accepting the note of a third person, for in the supposed case he would be the buyer." We think this concession is fatal to counsel's position. We notice, first, that there is absolutely nothing in the evidence tending to show that plaintiff knew that Mr. Booker was under any obligations, contractual or moral, to purchase the property for his wife, or that he knew that Mr. Booker was in any manner indebted to his wife, or had in his possession any money or property belonging to his wife. Mr. Booker at no time stated or intimated that his wife was purchasing the realty through him as her agent. At no time did he pretend to bind her or create any liability upon her part. Granting —what is not proved—that he said, during the negotiations, that he wished "to turn the property over to his wife free from incumbrances," that language did not imply that he contemplated an actual sale or transfer to his wife for a valuable consideration moving from her. Rather, it implied that, as a business man, he did not wish to have his home constantly exposed to the risk of business fluctuations, and he therefore proposed to get it free from incumbrances, and place the title in the name of his wife. Certainly, the plaintiff was warranted in so understanding it. But the testimony of the parties leaves no doubt as to who was the real buyer. Mr. Booker testified: "I am one of the defendants in this action. I negotiated a deal with Mr. Bray, the plaintiff, in September, 1895, by which I took the house and certain bank stock belonging to him, and executed the note (Exhibit B) at that time. I think I purchased eighty-three shares of bank stock from Mr. Bray at that time. It was eighty-two or eighty-three shares of the Grand Forks National Bank stock. The contract between myself and Mr. Bray, on the 30th of September, 1895, by which this house and bank stock was transferred to me, was: I took the bank stock and six hundred dollars' worth of furniture (the furniture was taken at fifty cents on the invoice price; the invoice was twelve hundred dollars, and at fifty cents, made it six hundred dollars) as part of this consideration. Then I was to take his bank stock and his house, and pay him five thousand dollars, and assume a note he had given to the Security Trust Company and his obligations at the Grand Forks National Bank as consideration. That was the contract." It is not claimed that the furniture and bank stock were not purchased by Mr. Booker; yet it was all in one contract, and he reiterates that he took the house, and that it was transferred to him. Touching the same point, the plaintiff testified as follows: "The talk was I was to make the deal if I could negotiate the note. He knew I was trying to negotiate the note. I don't think there was talk at

that time about the circumstance of the deed being made to Mrs. Booker, nor until after the deal was all closed, and I started to make out the deed. I asked him how he wanted the deed made, and he said to her. His wife was never mentioned,—never talked of her until after the transaction had been all completed." Viewed from the standpoint of the vendor, if this were not a case where the real buyer had the title made to another person for his own convenience, then it is impossible to conceive of such a case. Nor do we think the vendor's rights can be destroyed because of the existence of certain facts, hidden away from him, which made it obligatory upon Mr. Booker to purchase that home for his wife. We may add that it does not appear in this case that any obligation of Mr. Booker to his wife has ever been satisfied, in whole or in part, by reason of the transfer of the title to her. So far as we know, that obligation is in full force.

It is true, we think, that the principle announced in *Andrus* v. *Coleman*, 82 Ill. 26, would defeat the lien in this case. In that case the Court seems to recognize the doctrine that, where the vendor makes the deed to the wife, that fact alone is conclusive upon him that the wife was the real purchaser, and that her husband simply acted as her agent in the transaction. If this be true, then it must follow that a purchaser never could have the title placed in a third party for his own convenience, because the deed to such third party would be conclusive against the vendor that such third party was the real purchaser, and the party who carried forward the negotiations, and became responsible for the purchase price, was only the agent for the third party. But, if counsel in this case are correct in their concession, then the law must be different, and we think counsel are correct. The Supreme Court of Mississippi had this question under discussion in *Davis* v. *Pearson*, 44 Miss. 508. In that jurisdiction the lien is not given by statute, and the court recognized the general rule that taking the obligation of a third party was conclusive evidence of a waiver of the lien. But the particular point was whether or not the lien was waived when the husband negotiated the purchase and gave his obligations for the purchase price, but had the title conveyed to his wife. The Court said: "We think the principle deducible from the cases is that if the husband negotiates a purchase of land, and gives his written promise to pay the price, but has the title made to the wife, that the lien will be implied." If, with those conditions existing, the lien will be implied where it is not given by statute, certainly the existence of the same conditions will not destroy the lien where it is given by statute, while the same rule relative to taking security exists in both cases. The case of *Duke* v. *Balme*, 16 Minn. 306 (Gil. 270), has many points in common with this case. There the wife had placed a certain sum of money belonging to her separate estate in her husband's hands. The conditions were much the same as here. The husband might use the money as his own, but must ultimately account to his wife for it, or transfer to her

any land he might purchase with it. He used a portion of it to purchase three certain land warrants. Subsequently he purchased from the plaintiff a tract of land, and gave in payment therefor the three land warrants, with an express warranty of title thereto in himself. He then transferred the land to his wife at her request, and at an agreed price, in part satisfaction for the money advanced to him by her. It transpired that the husband acquired no title to the land warrants by reason of the fact that a prior assignment thereof had been forged. Of course, he transferred no title to plaintiff. Plaintiff held his express warranty of title, but he elected to treat the purchase price of the land as unpaid, and brought the action to enforce a vendor's lien thereon against both husband and wife. The Court sustained the action, and, in answer to the claim that the wife was an innocent purchaser, held that the husband was the agent for the wife in making the purchase. The facts in that case certainly made a much stronger case against the enforcement of the lien than has been made in the case at bar. We adhere to our original opinion.

(79 N. W. Rep. 293.)

GEORGE H. MARSHALL *vs.* ANDREWS & GAGE.

Opinion filed April 24, 1899.

Warehousemen—Conversion—Demand and Refusal.

Plaintiff delivered to defendants, at a public warehouse owned and operated by them in this state, certain grain, to be stored until plaintiff desired to sell. Subsequently plaintiff demanded of defendants pay for the grain, or a return to him of a like quality, kind, and quantity of grain. *Held*, that a refusal to comply with this demand constituted, prima facie, a conversion of the grain by defendants.

Destruction by Fire—Burden of Proof.

Defendants alleged that their said warehouse was destroyed by fire, with its contents, and that plaintiff's grain was contained therein. A reply admitted the burning of the warehouse, but denied that plaintiff's grain was contained therein. Under these pleadings, the burden was upon defendants to establish that the plaintiff's grain was destroyed as alleged.

Pleading Construed—Not an Action of Replevin.

Under the statutes of this state (specially referred in the opinion), in an action brought to recover the value of such grain an allegation in the complaint that the plaintiff was the owner and entitled to the possession of said grain, and a prayer that plaintiff recover a like quantity, quality, and kind of grain, or the value thereof, do not constitute the action an action in replevin.

Form of Verdict Cannot be First Questioned in Supreme Court.

Where an action was tried in the lower court as an action for conversion, the point cannot be raised for the first time in this Court that the action was in fact replevin, and that the verdict is not such as the law requires in that form of action.

Appeal from District Court, Walsh County; *Sauter*, J.

Action by George H. Marshall against A. C. Andrews and J. E. Gage, co-partners as Andrews & Gage. Judgment for plaintiff, and defendants appeal.

Affirmed.

Cochrane & Corliss, for appellants.

The action is in replevin, the fact that claim and delivery proceedings were not instituted in the case does not transmute the action from a replevin action into an action for conversion. *Benjamin* v. *Smith*, 44 N. W. Rep. 1083. The judgment is for money damages and not in the alternative as required by statute. § 5484, Rev. Codes. The plaintiff elected to follow his property in the defendants' hands instead of holding them for the value thereof in conversion, defendants have the right to insist that the adverse judgment shall be in such form as to give them the right to return the property at the end of the litigation in accordance with plaintiff's election. *Berson* v. *Numan*, 63 Cal. 550; *French* v. *Ginsburg*, 59 N. W. Rep. 189; *Sherman* v. *Clark*, 24 Mo. 43; *Baxter* v. *Berg*, 60 N. W. Rep. 711; *Jetton* v. *Smede*, 29 Ark. 373; *Hanf* v. *Ford*, 37 Ark. 544-550; *Cooke* v. *Aquirre*, 25 Pac. Rep. 5; *Stewart* v. *Taylor*, 68 Cal. 5; *McCue* v. *Tunstead*, 6 Pac. Rep. 316; *Rose* v. *Tolley*, 15 Wis. 443; *Dwight* v. *Enos*, 9 N. Y. 470; *Fitzhugh* v. *Wiman*, 9 N. Y. 559; *Allen* v. *Fox*, 51 N. Y. 562-564; *Berthold* v. *Fox*, 21 Mo. 51; *Chase County Nat. Bank* v. *Thompson*, 38 Pac. Rep. 274; *Lambert* v. *McFarland*, 2 Nev. 58; *Carson* v. *Applegarth*, 7 Nev. 187; *Hamilton* v. *Clarke*, 25 Mo. App. 428; *Gerlath* v. *Waldstein*, 7 Mo. App. 66; *Bates* v. *Scott*, 26 Ind. 202; *Goodwin* v. *Potter*, 58 N. W. Rep. 128-130; *Mayhew* v. *Mather*, 52 N. W. Rep. 436; *Phillipps* v. *Melville*, 10 Hun. 211. The verdict does not find the value of the property at the time of this trial. This is necessary in replevin. *Halbert* v. *San Saba S. L. & L. S. Ass'n.*, 34 S. W. Rep. 636, and cases cited; *Miller* v. *Bryden*, 34 Mo. App. 602-606; *Hoester* v. *Teppea*, 27 Mo. App. 207-210, and cases cited; *Allen* v. *Fox*, 51 N. Y. 562, 564, 565, where the reason for this rule is clearly stated; *Turk* v. *Moses*, 58 Me. 361. There is no evidence that the wheat was shipped out of the state. No conversion is shown by mixing the grain or that defendants had converted the grain prior to demand. When property in the hands of a bailee is destroyed or stolen the bailee is not liable for conversion. A demand made after the destruction or loss of the property is not even evidence of conversion against the bailee. Edw. on Bailm. § 406; *Salt Springs Nat. Bank* v. *Wheeler*, 48 N. Y. 492, 495, and cases cited; *Magnin* v. *Dinsmore*, 70 N. Y. 410-417; *Frome* v. *Dennis*, 45 N. J. Law, 515-520; *Smith* v. *Westfield*, 99 Mass. 605; *Dearborn* v. *Union Nat. Bank*, 58 Me. 273; *Heald* v. *Carey*, 11 C. B. 977; *Bowlin* v. *Nye*, 10 Cush. 416; *Packard* v. *Getman*, 4 Wend. 613; *Hawkins* v. *Hoffman*, 6 Hill 586; 26 Am. & Eng. Enc. L. 717.

Spencer & Sinkler, for respondent.

The Court upon the trial will grant such relief as the facts pleaded will warrant without regard to the prayer for relief. *McGillvray* v. *McGillvray*, 68 N. W. Rep. 316. Pleadings will be liberally construed after verdict to sustain the verdict and judgment. *Johnson* v. *Leonard*, 1 Wash. St. 564; *Fisk* v. *Kenarie*, 13 Ore. 156; *Wood* v. *Brown*, 34 N. Y. 337. Where there is failure, neglect or refusal by a warehouseman to deliver on demand goods that have been entrusted to him, it is prima facie evidence of negligence sufficient to cast upon him the burden of accounting for the nondelivery. *Burnell* v. *Ry Co.*, 45 N. Y. 184; *Schwerin* v. *McKee*, 51 N. Y. 180; *Collman* v. *Livingston*, 45 How. Pr. 483; *Fairfax* v. *Ry Co.*, 67 N. Y. 11; *Steers* v. *Steamship Co.*, 57 N. Y. 1; *Claflin* v. *Myers*, 75 N. Y. 260. The evidence on defendants' part must be conclusive that the property was lost, stolen or destroyed. *Williamson* v. *Ry. Co.*, 56 N. Y. 508; *Argent* v. *Squire*, 1 Daly 347; *Boise* v. *Ry. Co.*, 9 Am. Rep. 347; *Lancaster Mills* v. *Merchants C. P. Co.*, 4 Am. St. Rep. 586; *Cox* v. *Riley*, 58 Am. Dec. 633; *McGinn* v. *Butler*, 31 Ia. 160.

BARTHOLOMEW, C. J. On and prior to February 20, 1897, the defendants, as co-partners, owned and operated a public warehouse at the village of Drayton, in Pembina county, in this state. On and between the 18th day of December, 1896, and the 9th day of January, 1897, the plaintiff delivered to the defendants at said warehouse 600 bushels of No. 1 hard wheat, to be stored until such time as plaintiff desired to sell. On February 20, 1897, said warehouse, with its contents, was destroyed by fire. On March 17, 1897, plaintiff demanded of defendants 600 bushels of No. 1 hard wheat, or the then value thereof. His demand was refused. This action was then brought to enforce the demand. The complaint set forth the delivery of the wheat, and that plaintiff was still the owner thereof, the demand and refusal, and the value; and the prayer was for the delivery of 600 bushels of No. 1 hard wheat, or for a money judgment for the value thereof. The answer set up the destruction of the warehouse by fire, and alleged that the wheat received from plaintiff was destroyed therein. By reply the destruction of the warehouse was admitted, but it was denied that the wheat delivered by plaintiff was in the warehouse at the time of its destruction. Plaintiff introduced testimony tending to support all the allegations of his complaint, and rested. Defendants introduced no testimony, but moved for a directed verdict in their favor. This was denied, and an exception saved. On plaintiff's motion the Court directed a verdict for plaintiff for the sum of $360; that being the value of the 600 bushels of wheat on the day of the demand, as shown by the undisputed testimony. Nothing was said in the verdict about the ownership or right of possession of the specific wheat delivered, nor was its value fixed, in terms. A motion for a new trial was made and denied, and judgment rendered on the verdict. The appeal brings up the ruling on the motion for verdict and on the motion for a new trial, and the judgment.

The defendants' motion for verdict must have been based upon the proposition that since the delivery of the wheat into a certain warehouse, and the subsequent destruction of that warehouse and contents by fire, were admitted by the pleadings, a presumption arose that plaintiff's wheat was thus destroyed, and that the burden was upon plaintiff to show that the wheat had been removed from said warehouse prior to its destruction, if such were the case. We think this position is unsound, particularly in view of the well-known custom among warehousemen in this state to ship out grain that is received into the warehouse almost as soon as received, in order to make room for other grain that is constantly coming in. But, in the absence of such custom, the law is against appellants. Where the bailment is clearly shown (and it is admitted in this case), and where a subsequent demand by the bailor upon the bailee for a return of the property in accordance with the terms of the bailment is also shown, and a refusal by the bailee to comply with the demand (and this is all admitted in this case), the bailor has made a prima facie case of conversion. The burden then rests upon the bailee to show the loss or destruction of the property bailed, if such be the fact. No other rule could be admitted. It would generally be impossible for the bailor to show that the property had not been lost or destroyed, while the bailee, being in actual possession, should always be able to account for the subject of the bailment, and his failure to do so raises a presumption of negligence against him, which he can remove only by clear proof of the loss or destruction of the goods. *Burnell* v. *Railroad Co.*, 45 N. Y. 184; *Schwerin* v. *McKie*, 51 N. Y. 180; *Steers* v. *Steamship Co.*, 57 N. Y. 1; *Claflin* v. *Myer*, 75 N. Y. 260; *Clark* v. *Spence*, 10 Watts. 335; *Wilson* v. *Railroad Co.*, 9 Am. & Eng. R. Cas. 161; *McGinn* v. *Butler*, 31 Ia. 160.

It is urged, however, that the judgment cannot stand, because the action was in replevin, and the verdict was an ordinary money verdict, and contained no finding as to the ownership or right of possession of any particular wheat, or the value thereof,—matters which the statute specifically requires the verdict to cover in replevin actions. It is claimed that the action is in replevin, because the complaint alleges that the plaintiff is the owner of the wheat delivered to the defendants, and entitled to the possession thereof, and the prayer is in the alternative. Under the common-law system of pleading, such allegations were often held decisive in distinguishing the action of replevin from trover. But we do not consider any such distinction applicable in this case. Our statute fixing the rights of the parties in cases of this character is somewhat peculiar. Section 1790, Rev. Codes, specifies in general terms the form of warehouse receipts to be issued where grain is delivered for storage, and expressly declares that nothing shall be inserted in such receipt limiting the liability imposed by law upon the warehouse man. In this case the receipt issued was not such as the statute requires, but we understand both parties to treat it—and we think

it should be so treated—as a statutory receipt. The next section (section 1791) provides that each storage ticket shall expressly state that the holder may demand that the kind, quality, and quantity of grain so delivered be returned to him at the place of delivery. This section recognizes the usual and necessary custom of shipping grain out of the warehouses as the business may require. The holder of the receipt cannot insist upon a delivery to him of the identical grain at the place of storage, but he can insist upon the delivery of the same quantity of the same kind and quality of grain. Section 1792 provides that where grain is so delivered to a public warehouse, and the specified receipt taken therefor, such delivery constitutes a bailment, and not a sale. It appears, then, that, while the statute recognizes the right of the bailee to at once ship the grain out of the warehouse, yet as between the bailor and bailee the title to that particular grain remains in the bailor. Doubtless it was a consideration of these provisions which induced the plaintiff to allege that he was the owner and entitled to the possession of the wheat delivered. But it is clear that he did not seek to recover that wheat, because in his prayer he does not ask it, but only asks the delivery to him of the same quantity and quality of wheat. This, perhaps, was superfluous, as the option was with him to require the delivery of other wheat in lieu of the value in money; but, in view of the statutes under which the claim arose, we think this prayer had no tendency to show that plaintiff intended to sue in replevin. Again, it is clear from the record that this point was not made in the court below. Had it been seasonably made, the verdict might have been corrected, or, even if made upon the motion for a new trial, the motion might have been granted. But defendants treated the action as an action for conversion. The motion for a directed verdict for defendants was based upon the proposition that "the facts proven do not constitute a cause of action," and the notice of intention to move for a new trial contained the following: "The evidence is insufficient to sustain the verdict, in this: That there is no evidence of conversion by defendants of the grain, neither of unlawful detention. The proofs show destruction of the grain by fire. No negligence is alleged or proved; no malice; no proofs that defendants were insurers, or ever contracted to insure the grain; no competent proof of any liability on the part of the defendants at all. In no manner was the defect now insisted upon ever called to the attention of the trial court. For this reason also, this contention of appellants must be overruled.

What we said on the motion for a directed verdict disposes of the claim that the evidence fails to establish a conversion. Of course, if the wheat was burned, it could not be converted. Defendants alleged that it was burned. The burden was upon them to show that it was burned, as the pleadings did not admit that fact. They introduced no evidence. They received the grain. They have refused to return it, or other grain in lieu thereof, or to account for it in any manner. The statute declares that they were

bailees, merely, and that the grain delivered belonged to respondent. Appellants have failed to return it on demand, or to account for it. It is a clear case of conversion, under the authorities already cited. The judgment of the District Court is in all things affirmed.

YOUNG, J, concurs.

WALLIN, J. I concur in the Affirmance of the judgment. The facts established by the pleadings, in connection with those established by undisputed evidence, which was received without specfic objection thereto, are, in my opinion, sufficient to show a liability to the amount recovered. The complaint states a cause of action. This being true, I deem it unnecessary, under the facts shown by the record, to determine whether claim and delivery, or an action for damages as for a conversion of the grain, was the proper remedy, or whether either action would be the proper remedy, in view of the anomalous provisions of the statute.

(79 N. W. Rep. 851.)

PEOPLE'S STATE BANK OF LAKOTA *vs.* ELIZA A. FRANCIS.

Opinion filed May 1, 1899.

Wife as Surety for Husband—Mortgage Covenant.

Where F. executed certain promissory notes and a mortgage upon certain real estate belonging to himself to secure the same, and, at his request, his wife also executed the mortgage, and the mortgage contained an express covenant that the mortgagors would pay the debt thereby secured in accordance with the terms of said notes, but the wife did not sign the notes, and the mortgagee knew that the debt secured was the debt of F., the obligation assumed by the wife in the covenant contained in the mortgage was, to the knowledge of the mortgagee, that of surety for F.

Receiver Chargeable with Knowledge of Bank.

Where a receiver is placed in charge of the assets of a national bank, he stands, as to such assets, in the place of the bank, and is chargeable with knowledge of all facts known to the bank affecting the character of such assets.

Extension of Time by Receiver.

Such receiver has authority, upon sufficient consideration, to extend the time of payment of a debt owing such bank, where by so doing he can, in his judgment, strengthen the security he holds for the payment of such debt

Extension of Mortgage.

Section 4699, Rev. Codes, provides, among other things, that a mortgage can be "extended" only by an instrument in writing formally executed, but such provision has no reference to an extension of time for the payment of the debt secured by this mortgage. A mortgage is extended when it is made to stand for some debt or obligation not originally included therein.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the People's State Bank of Lakota against Eliza A. Francis. Defendant had judgment. Plaintiff appeals.
Affirmed.

J. E. Robinson, Templeton & Rex, for appellant.

The burden of proving suretyship and facts entitling her to a discharge from liability rested upon respondent. *Slate Co.* v. *Burdick,* 60 Minn. 270, 62 N. W. Rep. 285; *Guderian* v. *Leland,* 61 Minn. 67. The giving and accepting of collateral security which does not fall due until a future date does not of itself extend the time or discharge the surety. There is no presumption on such a transaction that there was an agreement for an extension of time. Brandt, Suretyship and Guaranty, 319, 320; *Dugan* v. *Sprague,* 2 Ind. 600; *Mills* v. *Gould,* 14 Ind. 278; *Austin* v. *Curtiss,* 31 Vt. 64; *Remsen* v. *Graves,* 41 N. Y. 471; *Globe Co.* v. *Carson,* 31 Mo. 218; *German Inst.* v. *Vahle,* 28 Ill. App. 557; *Merriman* v. *Barker,* 12 Ind. 74, 22 N. E. Rep. 992; *Fireman's Co.* v. *Wilkinson,* 35 N. J. Eq. 160; *Schlager* v. *Teal,* 39 Atl. Rep. 963; *Fisher* v. *Denver Nat. Bk.,* 45 Pac. Rep. 440. Respondent was only released by the agreement if at all to the extent of the value of the property as to which the debt was extended. *Spencer* v. *Spencer,* 95 N. Y. 353; *Murray* v. *Marshall,* 94 N. Y. 611; *Travers* v. *Doer,* 60 Minn. 173, 62 N. W. Rep. 269; *Fallkill Nat. Bk* v. *Sleight,* 37 N. Y. Supp. 155; *Owings* v. *McKenzie,* 133 Mo. 323, 40 L. R. A. 154; *De Goey* v. *Van Wyk,* 66 N. W. Rep. 787; *Stewart* v. *Bank,* 74 N. W. Rep. 865; *Everly* v. *Rice,* 20 Pa. St. 297; *Saline Co.* v. *Bina,* 65 Mo. 63; Brandt (2d Ed.) 426. The attorney for the receiver being a mere agent to collect had no authority to extend the time. *Behrus* v. *Rogers,* 40 S. W. Rep. 419; *Ritch* v. *Smith,* 82 N. Y. 627; *Lockhart* v. *Wyatt,* 44 Am. Dec. 481; Mechem, Agency, § 376-378; Story, Agency, § 99. The receiver's powers were limited to such as were conferred on him by statute. § 5224, Rev. Stat. U. S.; *Case* v. *Small,* 10 Fed. Rep. 722; *Ellis* v. *Little,* 27 Kan. 707, 41 Am. Rep. 434; High on Rec. 360; *Beckham* v. *Sheckelford,* 29 S. W. Rep. 200. The surety must affirmatively prove knowledge on the part of the creditor who grants the extension at the time he does so in order to establish his release from liability. *Nichols* v. *Parsons,* 6 N. H. 30; *Norton* v. *Myers,* 77 N. W. Rep. 298. Ecton, the receiver of the mortgagee and the person who granted the extension, was not an agent of the mortgagee. *Ex parte* Chetwood, 165 U. S. 443. He was not chargeable with the knowledge of his assignor as to whether an apparent principal was a mere surety. *Davenport* v. *King,* 63 Ind. 64; *Wilson* v. *Foote,* 11 Metc. 285. The mortgage which she signed apparently as principal binds defendant personally to pay the debt. § 4706 Rev. Codes. Under the facts and precedents there was no constructive notice that defendant signed the mortgages as surety. *Spear* v. *Walker,* 20 Cal. 660-667; *Davenport* v. *King,* 63 Ind. 64; *Mullendore* v. *Wurtz,* 75 Ind. 431; *Gahn* v. *Niemcewiez,* 11 Wend. 312. Constructive notice is not

sufficient. *Norton* v. *Myers,* 77 N. W. Rep. 298. A married woman in this state can contract with her husband or any other party as though she were unmarried. § 2590 Comp. Laws; *Col. & U. S. Mtge. Co.* v. *Stevens,* 3 N. D. 265. It appeared upon the face of the mortgage that the defendant was not a surety for the land was not her separate property but the property of her husband and the correct doctrine is that the wife is presumed to be a surety only when she mortgages her separate estate and has not the rights of a femme sole. Brandt, § 22; *Leary* v. *Shaffer,* 79 Ind. 567; *Tennison* v. *Tennison,* 114 Ind. 424, 16 N. E. Rep. 818; *Hawley* v. *Bradford,* 9 Paige Ch. 200; *Alexander* v. *Bouton,* 55 Cal. 15. The agreement to extend if made was void. § 4699, Rev. Codes; *Wells* v. *Harter,* 56 Cal. 342.

David R. Pierce, for respondent.

The proposition that respondent executed the mortgages as surety for her husband is clearly established. Mr. Ecton, the receiver, took the same subject to all equities, burdens and offsets existing between the original parties. *Porter* v. *King,* 1 Fed. Rep. 755; Wetherall's Appeal, 3 Gratt. 281; *Fisher* v. *Knox,* 1 Harris, 622; *Murray* v. *Lylburn,* 2 Johns. Ch. 441; *Union College* v. *Wheeler,* 61 N. Y. 88; *Simpson* v. *Del Hoyo,* 94 N. Y. 189; *Kleeman* v. *Frisbie,* 63 Ill. 482; *Wagner* v. *Winter,* 122 Ind. 57; *State* v. *Lake City,* 25 Minn. 404. The respondent did not sign the notes which these mortgages secured. This was notice to the receiver that she was not a principal debtor. *Alter* v. *inits,* 21 La. Ann. 317. The receiver took possession of the assets by authority of § 5234, Rev. Stat. of U. S., and such change of possession and the rights accruing thereunder, would have effect like a complete change in the officers of the bank. *Bank* v. *Kennedy,* 17 Wall. 22; *Price* v. *Abbott,* 17 Fed. Rep. 507. The circumstances proven are sufficient to show an agreement to extend. *Brooks* v. *Wright,* 13 Allen 72. The fact that a collateral note was given with additional security, both maturing December 1, 1895, is strong and convincing evidence of the intention to extend the principal indebtedness to that date. *First Nat. Bk.* v. *Lamont,* 5 N. D. 393; *Towle* v. *Greenberg,* 6 N. D. 37. The agreed purpose between the parties when the mortgages were executed was that Mrs. Francis should sign them for the purpose of waiving any rights she might have in the land. When, therefore, the signed instruments containing covenants binding her beyond such agreement such additional undertaking was without consideration and void. *Vanderbilt* v. *Schreyer,* 91 N. Y. 392; *Lattimore* v. *Harsen,* 14 Johns. 330.

BARTHOLOMEW, C. J. This case was tried by the Court. Plaintiff, failing to recover below, appeals, and demands a new trial in this Court upon all the issues raised by the pleadings. By the action plaintiff sought to recover a personal judgment against Eliza A. Francis, based upon the covenants to pay found in two certain real estate mortgages executed by Orin W. Francis and Eliza A. Francis, who were

husband and wife. The defense successfully made by Mrs. Francis was that she was surety for her husband, who was the principal debtor, and that the creditor extended the time of payment to her principal without her knowledge or consent. The testimony is not voluminous, and we have examined it carefully, and find the facts to be as follows: On February 1, 1893, Orin W. Francis was indebted to the First National Bank of Lakota in the sum of $4,482.70. On said date he executed and delivered to said bank nine certain promissory notes, representing said indebtedness, four of said notes being for $500 each, and maturing on December 1, 1893, with interest at the rate of 12 per cent. per annum. To secure the four notes last mentioned, Orin W. Francis and Eliza A. Francis executed a mortgage upon certain real estate owned by Orin W. Francis. This mortgage contained an express covenant that the mortgagors would pay said sum of $2,000 in accordance with the terms of said four promissory notes. At the time the notes were signed and the mortgage executed by Mr. Francis, Mrs. Francis was absent at a sanitarium in Michigan. The payee desired that Mrs. Francis should sign both the notes and the mortgage, but to this Mr. Francis objected. Finally, on the statement of the parties representing the bank that they desired to shut out any right of dower that Mrs. Francis might have, he sent the mortgage to her for execution. She says she signed it because her husband sent it to her and asked her to sign it. She received no money, nor was her separate estate ever in any manner benefited, by reason of the consideration for the indebtedness. On said February 1, 1893, Orin W. Francis executed to said bank five other promissory notes for the sum of $496.54, representing the balance of said indebtedness, and which said notes matured December 1, 1894. To secure said notes, said Orin W. Francis and Eliza A. Francis executed a mortgage upon other real estate belonging to said Orin W. Francis, which said mortgage also contained an express covenant on the part of the mortgagors to pay the sum secured thereby. The circumstances attending the execution of this mortgage by Mrs. Francis and her relations to the transaction were the same in all respects as in the mortgage first described. To secure his entire indebtedness to said bank, Mr. Francis also executed and delivered to the bank a chattel mortgage covering about 30 horses that he had on the farm. In the fall of 1893, the said First National Bank of Lakota was placed in the hands of a receiver. None of the notes were paid at maturity. In the spring of 1895, the receiver was threatening to foreclose the chattel mortgage. This Mr. Francis desired to avoid, and he testifies: "I made with them an arrangement whereby a part of the stock should be sold, and the proceeds applied on these notes, and part of the stock retained by me; that I should give an additional security, and notes would be extended,—that is, they would bring no action or proceeding against me for the foreclosure of the chattel mortgage or the real estate mortgage until the 1st

of December of that year." The defense also called the attorney for the receiver, with whom the contract was made, as a witness. The attorney does not go so far as Mr. Francis in his testimony. When asked if he made an agreement not to foreclose the real estate mortgages, he says he thinks not; that the negotiation related to the chattel security only, and amounted to an extension of time, so far as the chattel security was concerned. Under the terms of these negotiations, a portion of the property covered by the chattel mortgage was sold at private sale by Mr. Francis, and the proceeds turned over to the receiver, and properly indorsed upon the indebtedness. Mr. Francis also gave another note for the sum of $1,000, maturing December 1, 1895. This is called a "collateral note," and had no consideration except the original indebtedness. To secure this note, Mr. Francis executed a chattel mortgage on certain property not included in the original chattel mortgage. It was agreed that, upon payment of this note at maturity, all the chattel property should be released. Subsequently this note was paid, and both chattel mortgages were released in full. The proper amounts were indorsed upon the original notes, and thereafter they were sold and transferred to the plaintiff herein.

Under these facts, was the relation of Mrs. Francis that of surety for her husband in the covenants of payment contained in the mortgages? Did the mortgagee so understand it, and was the receiver charged with notice of such relationship? Was there such an extension of time as would release a surety? All these questions were resolved in the affirmative by the trial court, and appellant insists that none of them were rightly decided.

Section 4649, Rev. Codes, reads as follows: "A surety is one who at the request of another and for the purpose of securing to him a benefit becomes responsible for the performance by the latter of some act in favor of a third person or hypothecates property as security therefor." Section 4650 declares: "One who appears to be a principal, whether by the terms of a written instrument or otherwise, may show that he is in fact a surety except as against persons who have acted on the faith of his apparent character of principal." These sections were in full force at the time of the transactions in this case involved. It stands undisputed that the debt named in the mortgages was the debt of Orin W. Francis, and that Mrs. Francis signed the mortgages at the request of her husband, and that her individual estate was in no manner benefited thereby. It stands undisputed, also, that Mr. Francis refused the request of the mortgagee to have Mrs. Francis sign the notes secured by the mortgages, and that he consented to have her sign the mortgages only for the purpose of releasing any right of dower that she might have in the real estate. While these facts are not competent to show that she incurred no liability in signing the mortgages containing an express covenant to pay, yet they are competent to show, and undisputed they establish the fact, that the mortgagee knew that Mrs. Francis was not a principal debtor, and that whatever

liability to pay she incurred was as a surety for her husband. As against the original mortgagee, she was surety only.

Did the receiver stand in a better position? Appellant urges that the surety must affirmatively show knowledge of the suretyship on the part of the creditor who grants the extension in order to claim a release thereby. As a general proposition, that is doubtless correct, but it will be sufficient if the facts appear from which the law will presume such knowledge. Certainly, in this case, the receiver had not acted on the faith of the apparent character of Mrs. Francis as a principal, within the meaning of our statute. That statute contemplates acting to his detriment, and operates by way of estoppel. It is urged that the receiver was not chargeable with a knowledge of the facts that were known to the bank. This is an unwarranted contention. It would, we think, be a surprising holding to declare that a receiver of a bank could enforce all unmatured commercial paper that he found among the bank assets, irrespective of the equities existing against such paper. And yet that must logically follow, if the knowledge of the bank is not to be imputed to the receiver. The fact is the receiver of a national bank is neither an indorsee nor an assignee for value. He is simply an agent and officer of the United States. *Ex parte* Chetwood, 165 U. S. 456, 17 Sup. Ct. 385, and cases cited. The government places him in charge of one of its financial agencies for the purpose of closing it up and terminating such agency, and in so doing he simply acts in lieu of the officers of the bank. He replaces them, stands exactly in their shoes, so far as the assets are concerned, and their knowledge necessarily becomes his knowledge. It follows, therefore, that whatever the receiver did, by way of extending time of payment, was done with full knowledge that Mrs. Francis was surety only.

Was there, in fact, such an extension of time of payment granted by the receiver to the principal as releases the surety? The trial court, with the witnesses before him, so held. We, upon the cold record, reach the same conclusion. For whatever agreement was made there was sufficient consideration in the fact that a new mortgage was given covering property that had not theretofore been included. Mr. Francis testifies positively that the agreement was that no proceedings should be had, either upon the chattel mortgages or the real estate mortgages, until the maturity of the $1,000 note secured by the new chattel mortgage. The attorney who acted for the receiver thinks there was nothing said as to the real estate mortgages, but that the negotiation related only to the chattel security. In view of the fact that it was the duty of the receiver to realize on the assets as early as possible, and in view of the fact that he testifies that he thought he was strengthening his claim by taking the new chattel security, and in view of the fact that no steps whatever were taken to enforce the real estate security during the time for which it is claimed an extension was granted, we are of opinion that an actual extension of time, as to both the real and

personal security, was in fact given, or, at least, that such was the understanding, whether expressly so stated or not, and, this understanding having been acted upon, the surety is released. *Osborn* v. *Low,* 40 Ohio St. 347; *Ducker* v. *Rapp,* 67 N. Y. 464; *Lambert* v. *Shitler,* 62 Ia. 72, 17 N. W. Rep. 187.

It is urged that a receiver of a national bank has no authority to grant an extension of time. No case is cited where it has been so held. There are certain things a receiver may not do. He has no power to compound or settle claims without authority from a competent court. Such is the statute. Section 5234, Rev. Stat. U. S. And in the case of *Case* v. *Small,* 10 Fed. Rep. 722, cited by appellant, nothing more is decided, and that is held only by an inference. *Beckham* v. *Sheckelford,* 8 Tex. Civ. App. 660, 29 S. W. Rep. 200, also cited by appellant, decides the same point, and also that such receiver cannot settle a claim against the bank in such a manner as to give effect to a preference made by the bank after it became insolvent. And *Ellis* v. *Little,* 27 Kan. 707, is to same effect. No other cases are cited upon this point. The duties of the receiver required him to convert the assets of the bank into cash as speedily as was consistent with realizing the largest amount therefrom, and deposit the money with the comptroller of the currency for distribution among the creditors of the bank. In this performance of his duty, necessarily he must exercise a large discretion. It is inconceivable that all the details of collection are to be submitted to the comptroller, and his orders received thereon. Nothing of that kind was ever contemplated, and nothing of that kind is ever done in practice. We have no doubt that the receiver had full power to grant an extension of time, as was done in this case, if thereby he could secure additional security, which in his judgment strengthened the claim. If the receiver had authority to make such a contract for extension he had full power to ratify such contract when made by his attorney.

Counsel rely upon section 4699, Rev. Codes, which declares that "a mortgage of real property can be created, renewed or extended only by writing executed with the formalities required in the case of a grant of real property." Counsel wholly misapprehend the meaning of the word "extended" as there used. The statute has no reference whatever to an extension of time for the payment of the debt secured by the mortgage. A mortgage is "extended" only when it is made to stand as security for some debt or obligation not originally included therein. This can only be done as the statute directs. That this is what is meant will clearly appear from the cases which have considered the language. See *Stoddard* v. *Hart,* 23 N. Y. 556. California has the same statute, and appellant cites *Wells* v. *Harber,* 56 Cal. 342, as sustaining its view. An analysis of the case will show that it is given the same meaning we attach to it. In that case a note had been given with real estate security. The note became barred by the statute of limitations, and the lien of the mortgage, as the opinion recites, was extinguished. Thereafter the note

was renewed. Action to foreclose was brought. The Court said: "The agreement (of renewal) made between the payor and payee of the note, and indorsed on it in writing on the 10th of February, 1875, was the creation of a new contract. * * * It is this new contract that gives the plaintiff the right to recover the amount of the note. But the creation of a new contract to pay the money did not create a new mortgage to secure its payment." That, the Court say, could only be done as the statute prescribes. The judgment of the District Court is made the judgment of this Court, and is in all things affirmed. All concurr.

(79 N. W. Rep. 853.)

HENRICK F. EDDIE *et al. vs.* NICKOLAI EDDIE, *et al.*

Opinion filed May 12, 1899.

Lex Loci—Descent and Distribution.

Where both the personal and real property of an intestate is situated within this state, which is also his domicile at the time of his death, the laws of this state govern the descent and distribution thereof, following the rule that the descent of personal property is governed by the law of the domicile of the owner, and real property by the law of the place where situated.

Adoption of Illegitimate Children.

Chapter 8 of the Civil Code, relating to the adoption by adult persons of minor children other than their own by the procedure therein provided, requires that the persons adopting be inhabitants of the state. Section 2806 of this chapter, which provides for the adoption of an illegitimate child by its father by acts and conduct, construed, and *held*, that the adoption in law which results from the adoption in fact, is the same in legal effect as that resulting from an adoption by decree of court. Further, that the adopting parent must be domiciled within the state when the act of adoption occurs. Where both the father, mother, and their illegitimate children were domiciled in a foreign kingdom, whose laws made no provision for the adoption of illegitimate children by their father, such as exists in this state, the conduct of the father toward them in recognizing them as his own children, treating them as such, and contributing to their support, all occurring in the foreign state, and entirely discontinued after leaving the foreign country and coming into this jurisdiction, do not constitute an adoption under the laws of this state.

Right of Bastard Child to Inherit.

The right of an illegitimate child to inherit from its father is given by section 3744, Rev. Codes, found in the chapter on succession. Under this section he may inherit when the father has acknowledged him as his child by an instrument in writing, properly witnessed, but then only from his father directly, and not the estates of his lineal or collateral kindred,—and then as an illegitmate child. But, under the same section, if the legal relation of parent and child has been established by an adoption under section 2806, Rev. Codes, he is clothed with the full rights of inheritance of a legitimate child.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by Henrick Ferdinand Eddie and Axel Eddie against Nickolai Eddie and others. Judgment for plaintiffs. Defendants appeal.

Reversed.

J. A. Sorley, for appellants.

The plaintiffs are the illegitimate children of decedent, born in the Kingdom of Norway, where they still reside, all acts of recognition by which it is claimed they became legitimated took place in Norway. In the absence of proof it will be presumed that the common law prevails there. *Starr* v. *Peck,* 1 Hill, 270; *Throop* v. *Hutch,* 3 Abb. Pr. 23; *Abell* v. *Douglas,* 4 Denio. 305; *Holmes* v. *Boughton,* 10 Wend. 75; *Harvey* v. *Ball,* 32 Ind. 98. A person acts with reference to the law of his domicile. Under the common law an illegitimate child was incapable of becoming legitimaized. Inheritance is governed by the lex rei sitae but legitimacy is to be ascertain by the lex domicilii. *Ross* v. *Ross,* 129 Mass. 243; *Blythe* v. *Ayers,* 31 Pac. Rep. 915; In re Grove, 40 Ch. Div. 216; *Munn* v. *Munn,* 1 Rob. Scot. App. H. L. 492; *Sheldon* v. *Patrick,* 1 Macq. 535; *Miller* v. *Miller,* 91 N. Y. 315, 43 Am. Rep. 669. The law of the domicile of origin governs the state and conditions of a person in whatever country he may remove to. Story Confl. Laws, § 93; *Smith* v. *Kelly's Heirs,* 23 Miss. 170, 55 Am. Dec. 87; *Scott* v. *Key,* 11 La. Ann. 232; *Ross* v. *Ross,* 37 Am. Rep. 321; In re Goodman's Trust, L. R. 17 Ch. Div. 266; *Van Vorhis* v. *Brintwall,* 86 N. Y. 18; *Lingen* v. *Lingen,* 45 Ala. 411; *Dayton* v. *Askesson,* 14 Am. St. Rep. 763.

Tracy R. Bangs and *Wm. H. Standish,* for respondent.

The lex rei sitae governs the descent of real property and the domicile the distribution of personal property. 24 Am. & Eng. Enc. L. 425-427; *Carrol* v. *Carrol,* 20 Tex. 731; Story's Confl. Laws, 359-390. The heirship law of the state in which the property is located controls its descent. *Van Horn* v. *Van Horn,* 77 N. W. Rep. 846; *Caldwell* v. *Miller,* 23 Pac. Rep. 946; *U. S. Inv. Co.* v. *Caldwell,* 152 U. S. 65, 14 S. E. Rep. 504; *Harvey* v. *Ball,* 32 Ind. 98; In re Olivers' Estate, 39 Atl. Rep. 72; In re Washchers' Estate 36 Atl. Rep. 1124; *Leonard* v. *Braswell,* 36 S. W. Rep. 685; *Ewing* v. *Sneed,* 22 Am. Dec. 41; *Harris* v. *Harris,* 2 S. W. Rep. 549; *Blythe* v. *Ayers,* 31 Pac. Rep. 915. The word "adopts" as used in our statute means "legitimates." *Blythe* v. *Ayers,* 96 Cal. 532, 31 Pac. Rep. 919. Bastards legitimated in their own country by their home law will be refused the right to inherit real estate left by the parent in another state where the laws of the latter do not authorize such legitimation. *Stolze* v. *Doering,* 112 Ill. 234; *Kegan* v. *Greghty,* 101 Ill. 26; *Lingen* v. *Lingen,* 45 Ala. 410; *Barnum* v. *Barnum,* 42 Md. 251; *Smith* v. *Door,* 75 Am. Dec. 461; *Kimball* v. *Kimball,* 16 So. Rep. 783. Legitimatizing statutes should be liberally construed to effect their object, the giving of heirship rights

to natural children. Public recognition legitimates. *Crane* v. *Crane*, 31 Ia. 296; *Blair* v. *Howell*, 28 N. W. Rep. 199; *Bailey* v. *Boyd*, 59 Ind. 297; *Brock* v. *State*, 85 Ind. 397; *Van Horn* v. *Van Horn*, 77 N. W. Rep. 847.

YOUNG, J. This is a contest between the two sets of children of one Henrick Nickolai Eddie, deceased, to determine the right of succession to his estate. Eddie, the decedent, died in Grand Forks county October 9, 1886, without will, and possessed of considerable property, both personal and real, situated in that county. Henrick Ferdinand Eddie and Axel Eddie, who are plaintiffs herein, are the natural children of decedent. The defendants are his children by marriage, and are legitimate. The entire contest is as to the right of these natural children to share in the estate of their father by inheritance, under the laws of this state. The estate was probated in Grand Forks county, and final decree made, establishing the heirship of the defendants, and providing for a distribution of the estate in accordance with such findings. It appears that up to that time the existence of these natural children was unknown to the legitimate heirs. At least no claim was asserted by them in the probate court until some time after the final decree, when they presented a petition to that court setting out all of the facts upon which they base their right to inherit, asking that the decree establishing heirship and ordering distribution before made be vacated, and that they be permitted to share in the distribution of the estate as heirs of their father. The decree of the Probate Court, made after a full hearing of the evidence, denied their right to inherit. From that decree plaintiffs appealed to the District Court, where the decision of the Probate Court was reversed, and a decree was entered finding that plaintiffs were the legitimated children of decedent, and as such were his heirs, and directing the Probate Court to take such steps as were necessary to admit them to a full participation in the estate as heirs. From this decree the defendants appeal ot this Court for a review of the same questions presented below.

The undisputed facts which are pertinent to the issues are these: Henrick Nickolai Eddie, the decedent, was born in the Kingdom of Norway in 1843, near Levanger, where he resided continuously until 1869, when he came to the United States, where he lived thereafter and up to the time of his death. Prior to coming to this country he cohabited with one Sarah Rinnan, who also lived at Levenger. The plaintiffs are the issue of this intercouse; Henrick Ferdinand Eddie, born in 1861, and Axel Eddie, born in 1865. Both of these children lived with their mother up to the time of her death, which occurred about 20 years ago, and have always resided in Norway. There is no claim that their parents were ever married. After coming to this country, and in 1871, at La Crosse, Wis., Henrick Nickolai Eddie, the decedent, married Oleaana Gorden. The defendants are the issue of that marriage. After leaving Norway, in 1869, decedent never saw or communicated with the plaintiffs

or their mother in any way. Neither did he ever acknowledge these children as his own by written instrument. The plaintiffs base their right to inherit upon a claim that they were adopted by their father, and thereby became legitimated, and, as a result, became his heirs under the laws of this state. The material facts upon which the claim of adoption rests are found in the seventh finding of fact of the District Court, which is as follows: "That during all the time after the birth of each of said plaintiffs, and up to the date of the immigration of said Henrick Nickolai Eddie to the United States of America, said Henrick Nickolai Eddie treated each of these plaintiffs as if he were a legitimate child of him, said Henrick Nickolai Eddie. That during said time be furnished support and maintenance to each of said children and to their said mother. That during said time he corrected and reproved said children. That during said time he lived a portion of the time with the said children and their said mother at Levanger, aforesaid. That during all of said time the said Henrick Nicolai Eddie publicly acknowledged each of said children, Henrick Ferdinand and Axel Eddie, as his own." The district Court, in its conclusions of law, found that plaintiffs were adopted by decedent as his own children, by his acts, prior to 1869, and that they were his heirs at law, and as such entitled to participate in the distribution of his estate. It will be noticed that all of the acts of the decedent which it is contended amount to an adoption of plaintiffs occurred in Norway, when he and plaintiffs and their mother were all residents of that kingdom. There is nothing in the record to show what the law of Norway is, or that there is any legal authority in that country for the legitimating or adoption of bastard children. Neither is it at all material, for appellants do not claim to have been legitimated and given the capacity to inherit by the laws of their own country, but rest their alleged status of legitimated children and claim to inheritable blood solely upon the laws of this state, where their father resided at his death, and where the estate is situated. It is contended that the acts of recognition by their father which occurred in Norway prior to the year 1869, which are set out in the finding of fact before quoted, legitimized and made them heirs under section 2806, Rev. Codes, which reads as follows: "The father of an illegitimate child by publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it was a legitimate child, thereby adopts it as such, and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." The District Court reached the conclusion that there had been an adoption, and consequent legitimation, under this statute. Accepting the facts found by that court as true, we are yet not able to reach the same result. It is agreed that the laws of this state regulating the descent and distribution of property govern this estate. This follows necessarily from an application of the rule that personal property descends

according to the law of domicile of the owner, and real estate under the law of the place where situated, for in this case both the real and personal property, as well as the domicile of the owner, were within this state. Comity between states has not gone to the extent of recognizing the right of one state to designate the persons to whom realty situate in another state shall descend, and doubtless never will. Another principle which is as universally recognized is that the laws of each state fix the status of the persons domiciled therein. This was expressed in *Ross* v. *Ross*, 129 Mass. 243, as follows: "It is a general principle that the status or condition of a person, the relation in which he stands to another person, and by which he is qualified or made capable to take certain rights in that other's property is fixed by the law of the domicile, and that this status and capacity are to be recognized and upheld in every state so far as they are not inconsistent with its own laws and policy." We may also say that the domicile of an illegitimate child is that of its mother until it acquires one for itself, and that these claimants were, therefore, at all times domiciled in the Kingdom of Norway. It is apparent that the rights of claimants are determined by the construction to be given to secion 2806, Rev. Codes, upon which they rely. Is it a statute of descent or a statute fixing status? If it is a statute of descent, merely descriptive of a class of illegitimates who are thereby authorized to inherit property situated in this jurisdiction, the fact that claimants were domiciled beyond the confines of the state, and in a foreign land, will deprive them of no rights which the state may have given to them in the estate of the intestate. But, on the other hand, if it is construed as a statute of adoption, creating for those domiciled within the state a status of legitimacy between the illegitimate and its father, in all things like the adoption of another child save in the procedure, and followed by the same legal consequences, both to parent and child, then there can be no pretense that the acts which were all done without the jurisdiction, and in a foreign state, would be a compliance with the section quoted so as to constitute an adoption as so construed; for neither father, mother, children, nor property were in the state or territory when the acts of adoption are said to have occurred. Their own land attached to their status the stigma of illegitimacy. While so domiciled, it was not within the power of another state to remove it. But this absence of power to make or alter the status of the subjects of another state implies no restriction upon the right of the state to control the descent of real estate within its limits, and to lend the aid of its laws to convey their respective interests therein to such classes of persons as it may have designated as heirs, regardless of where they may be domiciled, or the status which they may have. Chapter 8 of the Civil Code, in which the section of the statute is found through which the plaintiffs claim a right to inherit, is composed of ten sections. The first seven sections provide for the adoption, by any adult person, of minor children other than his or her own, by a

decree of the District Court of the county of the residence of the adopting parent. The eighth fixes the status of the child so adopted as that of one born in lawful wedlock. The following section provides that the decree shall deprive its natural parents of all legal rights respecting it, and frees the adopted child from the obligations of obedience and maintenance to its natural parents. The chapter is concluded by the section in question, which is as strictly a statute of adoption as those preceding. By the former, one may adopt only the child of another, and then, by a decree of court, entered in the public records. By the latter a father is permitted to adopt his own child, not by public proceedings, and by written document containing and perpetuating the record of his child's disgrace, and his own shame, but by voluntarily assuming the usual relation and duties of a father; or, as expressed in the statute, "publicly acknowledging it as his own, receiving it as such with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child." The adoption in fact is made an adoption in law, and the statute serves the same purpose as the decree, "and such child is thereupon deemed for all purposes legitimate from the time of its birth." In short, all of the mutual rights and duties of parent and child are called into being, placing upon the father the legal obligation of care, education, and support, and giving to him the custody of the child, as well as a right to its earnings; while the child so adopted becomes bound to perform all of the duties of a legitimate child. The status thus created is that of a child adopted by regular procedure of court. Section 2802 of this chapter by its language expressly limits the right of adoption by application to the District Court to inhabitants of the state. While it is true, the father of an illegitimate child is not required to pursue the same steps to legally adopt his own child, yet, in view of the fact that the same status is created, and the same mutual and legal obligations between the adopting parent and his child result, the conclusion is irresistible that this section also only applies to parents who are domiciled within the state at the time the adoption in fact occurs. This view is in accord with the holding of the Supreme Court of California, where this same statute has been in force since 1873. See *Blythe* v. *Ayres,* 31 Pac. Rep. 915. One of the legal consequences resulting from the status so created is the right to inherit, but this right does not arise from the mere act of adoption, but is elsewhere expressly given to one who has been so adopted. Chapter 41 of the Civil Code fixes the rights of succession to the estate of intestates. Section 3744 of that chapter provides for inheritance by illegitimate children. The references to inheritance by children in section 3743 of this chapter are to legitimate children. See In re Magee's Estate, 63 Cal. 414. Section 3744, Rev. Codes, reads as follows: "Every illegitimate child is an heir of the person who in writing signed in the presence of a competent witness acknowledges himself to be the father of such child; and in all cases is an heir of his mother, and inherits his or her estate in whole or in part, as the

case may be, in the same manner as if he had been born in lawful wedlock; but he does not represent his father or mother by inheriting any part of the estate of his or her kindred either lineal or collateral, unless before his death his parents shall have intermarried and his father after such marriage acknowledges him as his child or adopts him into his family, in which case such child and all the legitimate children are considered brothers and sisters and on the death of either of them intestate and without issue the others inherit his estate and are heirs, as hereinbefore provided in like manner as if all the children had been legitimate, saving to the father and mother respectively their rights in the estates of all the children in like manner as if all had been legitimate. The issue of all marriages null in law or dissolved by divorce are legitimate." It will be noticed that by the first part of this section the father may, by a written acknowledgment, properly witnessed, enable his illegitimate child to inherit, and that in any case the child inherits from its mother, but in either case the inheritance is that of an illegitimate, and does not extend to the estates of either lineal or collateral kindred of either parent. On the other hand, by the succeeding provisions, when the relation of parent and child has been legally created, either by the marriage of the parents, and the subsequent acknowledgment of the child by its father, or the adoption of the child by the father into his family, such child then inherits as a legitimate child, along with children born in wedlock. The adoption into the family which here creates the right to inherit is the adoption provided for in section 2806 of chapter 8 of the Civil Code, which, as we have shown, must occur while the adopting parent is domiciled within the state. In this case both the petitioners and their father were domiciled in Norway when the acts of adoption are said to have occurred. Such acts did not, therefore, affect their status in this state. The petitioners were not adopted under the laws of this state, and are therefore not entitled to inherit under section 3744, Rev. Codes. The judgment of the District Court is therefore reversed. All concur.

(79 N. W. Rep. 856.)

COMMERCIAL BANK *vs.* THE RED RIVER VALLEY NATIONAL BANK.

Opinion filed May 17, 1899.

Principal and Agent in Collection of Paper.

Two promissory notes, made by R., who resides at Fargo in this state, were indorsed and delivered by the payees thereof to the plaintiff at its place of business in Rochester, N. Y. The notes were so delivered to plaintiff for collection only. Plaintiff transmitted the notes to the defendant at Fargo for collection. *Held* that, as between the plaintiff and defendant, the relation of principal and agent was created, and that the defendant was a subagent of the payees of the notes.

Real Party in Interest—Action for Negligence.

Held, further, under section 4133, Rev. Codes, that the plaintiff is a real party in interest, and can therefore maintain an action against the defendant for any damages arising from the negligence of the defendant in the matter of such agency.

Negligence of Collecting Agent—Damages.

Held, under the facts as stated in the opinion, that the defendant was negligent in the discharge of its duties and obligations as such agent, and that such negligence resulted in damages to the plaintiff.

Prima Facie Measure of Damages.

Held, further, where an agent for the collection of commercial paper is guilty of negligence with respect to such agency, that the measure of damages for such negligence is prima facie the amount of the paper, with interest. *Held*, under the evidence in this case, that the prima facie measure of damages must prevail.

Good Faith of Agent for Collection.

Held, further, under section 4111, Rev. Codes, that a party in this state, who assumes to act as an agent for the collection of any claim, is bound to give such collection the preference over any similar claim which the agent may have on his own account against the same debtor. If the agent cannot do this, good faith requires him to decline such collection.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the Commercial Bank against the Red River Valley National Bank of Fargo. Judgment for defendant, and plaintiff appeals.

Reversed.

Newman, Spalding & Stambaugh, for appellant.

Plaintiff has such an interest in the matter in controversy as to enable it to maintain the action. It was liable to E. P. Reed & Co. for damages sustained by them for the non-collection of the notes. The transaction between plaintiff and Reed & Co. was a New York contract and governed by the laws of that state. Reed & Co. can sue and recover from plaintiff under the laws of New York. *Allen* v. *Merchants' Bank*, 22 Wend. 215; 34 Am. Dec. 289 and n.; *Montgomery Bank* v. *Albany Bank*, 7 N. Y. 459; *Ayrault* v. *Pac. Bk.*, 47 N. Y. 570; *Commercial Bank* v. *Union Bank*, 11 N. Y. 203; *Exchange Nat. Bank* v. *Third Nat. Bk.*, 112 U. S. 276. This is the law of North Dakota. § 4133, Rev. Codes. And of other states. *Sthreissguth* v. *Bank*, 44 N. W. Rep. 797; *American Express Company* v. *Haire*, 21 Ind. 4; *Titus* v. *Bank*, 35 N. J. L. 588; *Reeves* v. *Bank*, 8 Ohio St. 465; *Simpson* v. *Waldly*, 63 Mich. 439, 30 N. W. Rep. 199; *Van Wart* v. *Wooley*, 3 Barn. & Cres. 439. It was defendant's duty to exercise reasonable care and diligence in the performance of its assumed duties. *First Nat. Bank* v. *Fourth Nat. Bank*, 77 N. Y. 320. To give plaintiff's business preference to its own. § 4111, Rev. Codes. And to keep plaintiff informed of its acts. § 4131, Rev. Codes. It failed to discharge any of these duties

and is liable in damages therefor. *Mound City Co.* v. *Bank,* 9 Pac. Rep. 709. The instructions of plaintiff could not be varied, modified or superceded by any local usage. The Reeside, 2 Sum. 567, 20 Fed. Cas. 458; *Insurance Co.* v. *Wright,* 1 Wall. 470; *De Witt* v. *Berry,* 134 U. S. 312; 1 Greenl. Ev. 292; § 3896, 3897, Rev. Codes. The measure of damages is prima facie the amount of the notes and interest . The burden is on defendant to mitigate damages. *Miranda* v. *Bank,* 26 Am. Dec. 493; *Durnford* v. *Patterson,* 12 Am. Dec. 514; *Washington* v. *Triplett,* 1 Pet. 25; Mechem on Agency, § 518; Sedgwick Dam. 340; Story, Agency, 219; Daniel's Neg. Inst. § 329; *Borup* v. *Nininger,* 5 Minn. 523; Suth. Dam. 18; *Allen* v. *Suydam,* 20 Wend. 330; *Mound City Co.* v. *Bank,* 9 Pac. Rep. 709.

Mills, Greene & Resser, for respondent.

The burden is upon plaintiff to show both negligence and that it was damaged by it. *Nat. Bk.* v. *Bank,* 91 U. S. 92; *Fabens* v. *Bank,* 23 Pick. 330; *Warren Bank* v. *Suffolk,* 10 Cush. 582; *Sahlien* v. *Bank,* 90 Tenn. 221, 16 S. W. Rep. 373; *Bruce* v. *Baxter,* 7 Lee. 477. Defendant had a right to prefer its own claim in taking security. *Freeman* v. *Bank,* 78 Ia. 150; *U. S. Nat. Bank* v. *Westerfelt,* 75 N. W. Rep. 857. The debtor was insolvent and no damages are proven. *Sahlien* v. *Bank,* 16 S. W. Rep. 373; *Exchange Nat. Bk.* v. *Bank,* 112 U. S. 276.

WALLIN, J. This is an action to recover damages of the defendant for alleged negligence and want of good faith in discharging its obligations as the agent of the plaintiff. The record shows: that the firm of E. P. Reed & Co., of Rochester, N. Y., were the payees in, and the owners of, two promissory notes which were executed and delivered to said firm by E. M. Robinson, a merchant doing business at Fargo, N. D. One of said notes was for $125, and bore date December 17, 1894. The other was for $180.35, and was dated January 1, 1895. Each note matured 90 days after its date. That, prior to the maturity of said notes, the said payee and owner thereof indorsed the same in blank, and delivered them to the plaintiff for collection only; said plaintiff then and ever since being a national bank, located and doing business at Rochester, in the State of New York. It appears that, prior to their maturity, the plaintiff transmitted said notes to the defendant, and the defendant received the same as agent, for collection and remittance; the said defendant then and now being a national bank, located and doing business at Fargo, N. D. Each of said notes, when sent to the defendant, was accompanied by a letter of transmittal, upon which were written and printed certain directions to the defendant. The following directions were printed: "Do not hold for collection for the convenience of parties. Return at once, if not paid. Protest all paper, unless otherwise ordered." The following direction was in writing: "No pro." (meaning no protest). The notes were presented by the defendant to E. M. Robinson for

payment, but they were not paid. Defendant omitted to make the usual acknowledgment of the receipt of the collection; and, without doing so, it held the note first falling due a period of about 30 days after it had matured, and the other about 14 days after it fell due, before making any reply whatever to plaintiff's letter of transmittal. It further appears that on April 18, 1895, in reply to a telegram of inquiry sent by the plaintiff on that day, the defendant made its first report to the plaintiff upon the subject-matter of said collections. Defendant's reply dispatch to plaintiff was as follows: "Robinson's notes unpaid. Shall we return? No prospect of payment." Upon the receipt of this telegram the plaintiff demanded the notes, and they were turned over to the plaintiff's attorneys on April 22, 1895. Subsequently, and before this action was commenced, the plaintiff caused a demand of payment to be made upon E. M. Robinson; but the notes were not paid, and have never been paid. But it further appears that, in the interval elapsing after receiving plaintiff's letters of transmittal and before the 18th day of April, 1895, on which date said telegram of inquiry was received by defendant, certin highly important financial transactions were had between said E. M. Robinson and the defendant. These transactions are perhaps best stated in the language of the findings of fact, and are as follows: "That on or before the 15th day of April, 1895, and while said notes remained in the possession of the defendant, as aforesaid, for collection, the said Robinson was indebted to the defendant in the sum of $9,378, a part of which indebtedness had been standing against Robinson, and in favor of the defendant, for more than one year, and from time to time had been increased by advances made by defendant to said Robinson until it aggregated the sum above mentioned; that on the said 15th day of April, for the purpose of securing the amount of said Robinson's indebtedness to the defendant, the defendant, without notice to the plaintiff, took from said Robinson to itself the following securities: First, a chattel mortgage upon the stock of boots, shoes, trunks, and other merchandise contained in the store in the City of Fargo, known as the 'St. Louis Shoe Store'; second, a mortgage upon the farm of said Robinson, consisting of 680 acres of land situated in Cass county, N. D., and subject to a prior mortgage of $6,500, which mortgages were given to seure a note of $9,000, dated February 28, 1895, and due September —, 1895, given by said Robinson to the defendant on said 15th day of April, 1895, and due 60 days after the date thereof." The Court further finds "that the security so taken by the defendant upon the property of said Robinson covered substantially all of said Robinson's property, except certain stock in the defendant bank and his household effects, and that said bank stock had been pledged by said Robinson as collateral security for an indebtedness to one Hector; that the security so taken from said Robinson by the defendant was not excessive; and that there was realized from the sale thereof less than the amount of the indebted-

ness of the defendant bank." The Court further finds that no inquiry about the notes was received by the defendant from the plaintiff prior to said 18th day of April, as before stated. The Court finds also that at the time said notes were renewed by the defendant, and at all times thereafter, the defendant was insolvent, and that "from and after April 15, 1895, was known by the defendant to be insolvent, and unable to pay his debts as they matured." The Court further finds "that it was the local usage and custom of banks in said City of Fargo and vicinity, when notes were sent to them for collection, with instructions not to protest the same, to retain possession of the notes for the purpose of effecting a collection thereof at a later time, if possible, and that the defendant, pursuant to such local usage and custom, retained possession of the notes aforesaid after the presentation of the same for the purpose and with the expectation of making collection thereof from said Robinson, and so retained the same until the 22d day of April, 1895, when the said notes were, by direction of the plaintiff, delivered to the Fargo attorneys of the plaintiff." Certain other facts which appear by the undisputed evidence should be stated. It appears that the notes, after being turned over by defendant to the plaintiff's attorneys for collection, were not collected, and could not be collected, of Robinson. At that time all of his visible assets not exempt from seizure had been fully covered by mortgages taken by the defendant to secure its own claims against Robinson. The notes were properly presented for payment by plaintiff's attorneys, but they were not paid. Suit on the notes was not commenced, because a suit would have been fruitless. Under the testimony, it was deemed a "hopeless case" after the defendant obtained its mortgages. At the time the notes were received by the defendant, E. M. Robinson was engaged as a merchant in the business of selling boots and shoes, and had a store at Fargo, in which there was a stock of goods worth not less than $2,500. This merchandise was not then incumbered, nor was his real estate incumbered to its full value at that time. He was seriously embarassed, it is true, but still was then in a position to secure small claims such as those in question. The president of the defendant bank was a witness, and testified as follows: "I have the account of E. M. Robinson from March 1st until the 16th day of April, 1895. It shows the deposits and checks for each day. On the 1st day of March he was overdrawn $1,216.40. On the 2d day of March he deposited $20. On the same day we made him a loan of sufficient money to cover his overdraft and take up a certain number of collections that were here in the hands of attorneys that were pressing him. We made him a loan of $1,822.90, which covered the overdraft of $1,216, and provided for some checks that he was to pay for merchandise accounts,—some in the hands of attorneys here, and some he wished to remit. They were all notes and collections long past due. The other deposits are small ones,—$20 or $30 each day until the 16th day of April, when there was another loan made him of $366 to

pay some note. He did not have any balance to his credit subsequent to that loan of $1,800. There was no balance on any day when these checks are charged up which he issued to provide for out of this deposit. He did not have at any time any balance to his credit subject to check. Even more than that, the checks came in faster than the deposits were made. The account was largely an overdrawn account. He deposited every day what he took in, but never enough to keep up with the checks." Upon the state of facts as disclosed by this record, the trial court found the following conclusions of law: "(1) That the plaintiff is not the real party in interest, and cannot maintain this action; (2) that the plaintiff has sustained no damages by reason of any act or omission of the defendant relating to said notes or otherwise, or at all." The action was accordingly dismissed below, and judgment was entered for costs against the plaintiff. In this Court a retrial of the entire cause is demanded by the plaintiff.

Taking up the conclusions of law as made by the trial court in their order, we are compelled to hold that the court below erred in deciding that the plaintiff was not the real party in interest, and that it cannot for that reason maintain this action. It is true that the question whether an agent of an agent is liable to the principal in damages for a loss caused by the acts of the sub-agent has been much discussed by the courts, and there is good authority on both sides of the question. See extended notes and citation of cases appended to the case of *Allen* v. *Bank*, 34 Am. Dec. 289. In New York and some other states and in the federal courts the rule that the agent can maintain an action against the subagent for the negligence of the latter, and that the principal cannot do so, is firmly established. See *Allen* v. *Bank*, supra; also, *Ayrault* v. *Bank*, 47 N. Y. 570; *Montgomery Co. Bank* v. *Albany City Bank*, 7 N. Y. 459, affirming in part 8 Barb. 396. See, also, *Mound City Paint & Color Co.* v. *Commercial Nat. Bank* (Utah) 9 Pac. Rep. 709; *Simpson* v. *Waldby*, 63 Mich. 439, 30 N. W. Rep. 199; *Streissguth* v. *Bank* (Minn.) 44 N. W. Rep. 797; and *Exchange Nat. Bank of Pittsburgh* v. *Third Nat. Bank of New York*, 112 U. S. 276, 5 Sup. Ct. 141. But in this state the controversy has been set at rest by section 4133 of the Revised Codes, which is as follows: "A mere agent of an agent is not responsible as such to the principal of the latter." Applying this rule to the case at bar, the defendant is not legally responsible to E. P. Reed & Co., who own the notes in question, and who are the principals of the plaintiff. The owners of the notes have no contractual relations with the defendant. They dealt solely with the plaintiff and under the rule of law which obtains in New York, and in this state they are required to look only to the plaintiff for redress or damages for any acts of negligence to their detriment done either by the plaintiff or by agents appointed by the plaintiff. A corollary of this rule of law requires that the plaintiff, who must respond in damages to its principal (Reed & Co.) for the consequences of the defendant's

derelictions of duty, can have redress over against the defendant. And this rule is sustainable, not only on principles of justice, but by the cases above cited as well. If the sub-agent cannot be held liable by the original principal, he would escape liability entirely but for the rule that he is answerable to his immediate principal, the agent originally chargeable; and we therefore hold, under the authorities cited, that he is so responsible.

But the remaining questions are much more difficult of solution. The trial court holds that the plaintiff has sustained no damages by reason of any act or omission of the defendant relating to said notes. This would be technically true, of course, if, under the law, the plaintiff could not maintain an action against the defendant for the negligence charged in the complaint; but, as we hold the reverse of this, it becomes necessary to inquire whether, under the evidence and the facts found, an action can be maintained against the defendant. After mature consideration, we are constrained to hold that the action can and should be upheld. But, before proceeding to discuss such features of the case as we deem decisive, we will briefly advert to a point which we consider of subordinate consequence. We refer to the matter of the printed and written letters of transmittal in which the two notes in question were respectively indorsed by plaintiff and sent to the defendant. On their face, when literally construed, these instructions are entirely plain and explicit. They required the defendant not to hold the notes for the convenience of the debtor, and directed that the same be returned "at once, if not paid." We have seen that these instructions were wholly ignored by the defendant, and that one note was held about 30 days after its maturity, and the other about 14, and that the notes were not surrendered to plaintiff until a written order for the same was presented by plaintiff's attorneys, and the notes demanded. But defendant contends that its failure to comply literally with such instructions was in conformity to a business usage prevailing among bankers in this state with respect to "no protest" collections sent to them. The Court has found that such usage exists, as has been already seen, and we are inclined to think that the finding is fully justified by the evidence contained in the record. Under the evidence, the usage is such that it wholly abrogates the printed instructions as to a prompt return of the paper, if the same is unpaid. But counsel for plaintiff strenuously contends that no mere usage, however general it may be, can nullify the specific instructions of a principal to an agent. The question is one of importance, but, as we have said, is not, in our opinion, necessarily decisive of this case. We shall therefore content ourselves with the citations of authority bearing upon it, and leave the point undecided. See 1 Morse, Banks, § 9, note 21; also, *President, etc.* v. *Triplett*, 1 Pet. 25. Contra: Mechem, Ag. p. 327, note 2; *Wanless* v. *McCandless*, 38 Ia. 20; *D. M. Osborne & Co.* v. *Rider*, 62 Wis. 235, 22 N. W. Rep. 394; *Greenstine* v. *Borchard*, 50 Mich. 434, 15 N. W. Rep. 540; *Day* v. *Holmes*, 103 Mass. 306.

See views of Judge Story in The Reeside, 2 Sumn. 567, 20 Fed. Cas. 458 (No. 11657). Assuming, for the purposes of the case, that the special instructions to the defendant are not binding by reason of said usage,—a view of the case which is quite favorable to the defendant,—the question is presented whether, upon the evidence and facts in this case, the defendant is liable under established principles of the law governing the relation of principal and agent. At the common law, as well as by the express provisions of the Civil Code, an agent rests under certain obligations, and is bound to perform certain duties, with respect to his principal; and if such obligations are disregarded and such duties are left unperformed, and damages result therefrom, an action against the agent will lie to recover such damages. Among those most prominent and familiar of the obligations and duties of an agent are the following: In the performance of his duties an agent is bound to exercise that degree of skill, care, and diligence which the nature of his undertaking calls for with reference to the time, place and circumstances surrounding the undertaking. Again, an agent is bound to observe such precautions as are ordinarily observed in relation to the business with which he is intrusted. While, on the one hand, the employer will be required to submit to such incidental losses as may occur in the course of the employment, on the other hand, the agent will be held responsible in the law for losses which are the result of his own want of diligence, or his bad faith or dishonesty. These rules are entirely elementary, and citations in their support are needless, and none will therefore be made. We shall content ourselves with quotations from the Civil Code of the state, in which some of these familiar principles are tersely expressed in the form of statutory enactments. Section 4131 reads: "An agent must use ordinary diligence to keep his principal informed of his acts in the course of his agency." Section 4106 reads: "An employe is bound to exercise a reasonable degree of skill unless his employer has notice before employing him of his want of skill." Section 4107 declares: "An employe is bound to use such skill as he possesses so far as the same is required for the services specified." Section 4111 is as follows: "An employe who has any business to transact on his own account similar to that intrusted to him by his employer must always give the latter the preference. If intrusted with similar affairs by different employers he must give them preference according to their relative urgency, or other things being equal, according to the order in which they were committed to him." In the light of these provisions of the statute, voicing, as they do, well-established principles of the law of agency, the question is presented whether the defendant, as plaintiff's agent for the collection of the notes in question, has discharged its obligations as such agent with reasonable fidelity, and if it has failed to do so, whether damages have resulted to the plaintiff from such failure. After careful consideration of the entire case as disclosed by the record, this Court is unanimously agreed that the defendant

has neglected to discharge its duties and obligations in the premises, and that such neglect has resulted in damages to the plaintiff. It is conceded that, during the whole period of its agency, the debtor (Robinson) was a stockholder and director of the defendant, and that he kept a deposit account with the defendant. At the time the notes were received for collection Robinson was largely indebted to the defendant, and the amount of such indebtedness had been augmenting for years. Besides the large demand of the defendant, other creditors were pressing Robinson for payment, to the defendant's knowledge, and, after receiving the notes for collection, the defendant itself made a loan to Robinson to a considerable amount to enable him to meet the claims of creditors who would not be longer postponed. It is apparent from the record that the defendant was in close confidential relations with the debtor, and thoroughly understood the fact that Robinson was liable at any hour to be assailed by his creditors, and that, if so assailed, he would not be able to meet and pay his obligations if his property should be sold at forced sale for that purpose. The president of the defendant testified, in effect, that the security taken of Robinson by the defendant was intended to prevent Robinson's goods from being sold under the hammer and at a sacrifice. Under these circumstances, the question arises whether the defendant, as the agent of the plaintiff, faithfully discharged its duty with respect to the notes in question. Defendant, as a bank and as a collector, is presumed to know what business prudence demanded, in view of Robinson's critical financial condition when the notes reached the bank and at all times while the agency continued. When the notes reached the bank, and for many weeks thereafter, the debtor was doing business as a merchant at Fargo, and had a stock of goods worth at least $2,500 in his store, which was unincumbered. Besides he had valuable real estate in the same county which was only partially incumbered. Under such circumstances, we think that a vigorous collector might reasonably expect to collect these notes in whole or in part, or at least would have a reasonable chance to secure their payment if the proper effort had been made in that direction. True, the defendant might not have been authorized to accept security from Robinson; but the case was one of great urgency, and to the defendant's knowledge prompt action of some kind was demanded. The exigency was such that, if the defendant did not deem itself authorized to proceed to extremities, it certainly was its duty to inform its principal at once on receipt of the notes of the true financial condition of the debtor, and thus relieve itself of responsibility. This, as has been seen, the defendant did not do. It not only refrained from putting the principal in possession of the true facts of the case on the receipt of the notes, as it should have done, but it continued to withhold such information not merely until the notes had matured, but for a long period of time thereafter, and then replied only in response to plaintiff's telegram of inquiry. In this the defendant was derelict, under

section 4131 of the Revised Codes. It did not use ordinary care and diligence to keep the principal informed of its own acts respecting the subject-matter of the agency. The circumstances unmistakably point to the conclusion that the defendant was doing what it could do to befriend the debtor, and for this purpose it refrained from pressing these claims for payment, well knowing that, if the collection were pressed, a crisis might be precipitated which would not only operate disastrously as to Robinson, but might also jeopard the defendant's large claims against him. But the law steps in in such a case and establishes a standard of conduct different from that acted upon by the defendant in this case. The statute, voicing the better authorities, declares in terms that "an employee who has business to transact on his own account similar to that intrusted to him by his employer must always give the latter the preference." Measured by this true standard of business conduct, it was the defendant's bounden duty to either decline the trust in toto, or, if it was assumed, to discharge it faithfully in the light of the letter and spirit of the law governing the relation of principal and agent. Under the facts, it was a plain violation of the duty of an agent to surpress the vital information which it had, and, while keeping the principal in ignorance of the true state of Robinson's affairs, proceed to obtain from the debtor security for the payment of its own claims, and thereby preferring its own claims to those of its principal. The conduct of the defendant is clearly actionable. Whether damages were actually suffered by the principal is perhaps problematical. It is not possible to state with certainty whether the plaintiff, if it had received timely information of the facts within the knowledge of the defendant could have collected the notes. The court below found that the debtor was insolvent when the notes came into defendant's possession. This was doubtless the fact technically and in the sense that the defendant could not then meet his obligations promptly as they matured, but there is no evidence that Robinson's debts were in excess of the value of his property. During the whole period of the agency, and until the bank covered the debtor's property by its own mortgages, Robinson was making payments upon his indebtedness in small sums as he could, and at the same time he had an unincumbered stock of merchandise in his store at Fargo. But whether the notes could or would have been paid or secured, if the defendant had fully discharged its duties in the premises, will perhaps never be known It will suffice, for the purposes of this case, to state that the plaintiff's measure of damages is, prima facie, the amount of the two notes in question. Mechem, in his work on Agency, states the rule as follows: "The measure of damages in an action against an agent for negligence in collection is the actual loss sustained. The negligence being established, that loss, prima facie, is the amount of the claim; but the agent may show that, notwithstanding his negligence, the principal has suffered no loss, and the recovery can then be for nominal damages only." Daniel on

Negotiable Instruments states the rule thus: "The loss is, prima facie, the amount of the bill or note placed in its or his hands, but evidence is admissible to reduce it to a nominal sum." Daniel, Neg. Inst. § 329, and cases cited; Mechem, Ag. § 518, and cases cited. As has been seen, the evidence in this case has failed to overcome the prima facie damages established by the plaintiff. It necessarily follows from what has been said that the plaintiff should have judgment in this action, and the court below is therefore directed to reverse the judgment appealed from, and enter a judgment for plaintiff and against the defendant for the amount of the two notes described in the complaint, with interest as stated in the notes to the date of entering judgment, together with plaintiff's costs in both courts. It will be so ordered. All the judges concurring.

(79 N. W. Rep. 859.)

WILSON L. RICHARD *vs.* STARK COUNTY.

Opinion filed May 18, 1899.

Statutes—Title of Act—Constitutional Law.

Chapter 25, Laws 1895, is entitled "An act to increase the revenues of the state by changing and increasing the boundaries of the counties of Billings, Stark and Mercer." The body of the act simply increases the boundaries of such counties. *Held,* that the act is unconstitutional, because the subject of the act is not expressed in the title, as required by section 61 of the constitution of this state.

Appeal from District Court, Stark County; *Winchester,* J.

Action by Wilson L. Richards against Stark County. From a judgment sustaining a demurrer to the complaint, plaintiff appeals. Reversed.

John Burke and *Burke Corbett,* for appellant.

L. A. Simpson, for respondent.

BARTHOLOMEW, C. J. Plaintiff brought this action against Stark County to procure by a civil action relief formerly recoverable by information in the nature of quo warranto. There was a general demurrer to the complaint, under which, of course, no question as to parties plaintiff or form of action could be raised. The demurrer was sustained, and plaintiff appeals from the order. It is conceded that the case turns exclusively upon the constitutionality of chapter 25, Laws 1895. Plaintiff brings this action upon the theory that such act is unconstitutional. If he is in error, he must fail. The act is attacked as violating a number of the provisions of the constitution, but we shall confine ourselves to a consideration of section 61, which reads: "No bill shall embrace more than one subject, which shall be expressed in its title, but a bill which violates this provision shall be invalidated thereby only as to so much thereof as shall not be so expressed." This section has on three

different occasions been brought directly before this Court. The first case was *State* v. *Woodmansee*, 1 N. D. 246, 46 N. W. Rep. 970, in which we held that an act entitled "An act to provide for the organization and government of state banks" might properly include a provision providing a punishment for doing a banking business in this state contrary to the provisions of the act. In that case we recognized and indorsed the principle that this constitutional provision must receive a reasonable and liberal construction, and that it was never intended to impede or embarrass legislation, and that provisions for the enforcement of an act are germane to the act itself. The second case was *State* v. *Haas*, 2 N. D. 202, 50 N. W. Rep. 254, which was an attack upon what is known as the "Prohibition Law." It was urged that both the act and the title embraced two subjects,—first, the penalties for the unlawful sale, etc., of intoxicating liquors; and, second, the regulation of the sale of intoxicating liquors for medicinal and other purposes. We held that the one subject was the regulation of the liquor traffic, that this was done by prohibiting in part and restricting in part, that all regulation of the traffic was to some extent prohibitory, and that the exent of the prohibition did not affect the regulating character of the act. The third case was *State* v. *Nomland*, 3 N. D. 427, 57 N. W. Rep. 85. In that case we held the act unconstitutional on the ground that the subject of the act was not expressed in the title. But in that case, as in the preceding cases, the Court recognized to the fullest extent the necessity for a liberal construction of this particular provision, and recognized the fact that it is never necessary that the instrumentalities by or through which the object of an act is to be accomplished should be expressed in the title, and that it was sufficient if the real subject of the act was expressed even in the most general terms in the title. But in this last case the Court held that where the title to the act simply provided for the creation of an instrumentality, and in no manner mentioned the subject upon which, by the body of the act, that instrumentality was to act for the accomplishment of a certain purpose, the defect was fatal, and the act unconstitutional, not because it embraced more than one subject, but because the real subject was not expressed in the title. A reading of the provision discloses that it may be violated in two ways: First. The act must not embrace more than one subject. If it embraces two subjects, and both are fully expressed in the title, still the provision is clearly violated. Black, Const. Law, 288; Cooley, Const. Law, 178. Second. If it embraces but one subject, and that subject be not expressed in the title, the provision is equally violated. This is the clear language of the provision. "But if the act relates to one subject matter, which is properly expressed in the title, and also embraces provisions not related to such subject, which are not mentioned in the title, then the foreign or unrelated matters will be separated from the rest of the statute, if possible, and rejected, while the main body of the act will be sustained." *People* v. *Briggs*, 50 N. Y. 553; Cooley, Const. Law, 148. We have

already seen that the means and instrumentalities by which the purposes of an act are to be accomplished need never be expressed in the title. If the subject be expressed, that is sufficient. Adding the means or instrumentalities neither adds to nor detracts from its sufficiency. Black, Const. Law, 287; Cooley, Const. Law, 170.

With this statement of general principles, we may proceed with an examination of the statute in question. It is entitled "An act to increase the revenues of the state by changing and increasing the boundaries of the counties of Billings, Stark and Mercer." It requires no studied analysis of this title to discover—First, that the declared subject of the act is an increase in the revenues of the state; and, second, that the remainder of the title but specifies the means and instrumentalities by which that increase is to be secured. But the allegation of the means and instrumentalities in no manner affects the announced subject. If the title be good, it does not require the additional allegations. If the title be bad, the additional allegations cannot cure it. For the purpose of the question under discussion, the title is simply "An act to increase the revenues of the state." Turning to the body of the act, we find it contains five sections. The first fixes the boundaries of Billings county, the second fixes the boundaries of Stark county, and the third fixes the boundaries of Mercer county. The fourth section provides that the provisions of the three preceding sections shall not go into effect until the matter has been submitted to a vote of the qualified electors of the respective counties. The fifth repeals all conflicting laws. From first to last, there is no reference, in terms, to the revenues of the state in the body of the act. But counsel for respondent insists that this Court must take judicial notice that the necessary result of the act was to increase the revenues of the state. We do not so understand it. True, we may take notice that all the vast expanse added to the counties named by the act consists of unorganized counties. But, while we have no doubt of its truth, we cannot take judicial knowledge of the fact that such territory is but sparsely populated, and is covered with vast and valuable herds of cattle, horses, and sheep. But that fact cannot aid respondent. Under the law as it stood prior to the passage of this act, all taxable property in unorganized counties was taxed for state purposes in all respects the same as property in organized counties. Sections 1336 to 1339, inclusive, Rev. Codes. No increase in the revenue of the state was possible under the provisions of the act. This is not a case where the act is broader than the title, or where the title is broader than the act. It is simply a case where the subject as named in title is not adverted to in the body of the act, and where the subject as set forth in the body of the act is not named as a subject in the title. We would have a very different case had the title read "An act to increase the revenues of the state and changing and increasing the boundaries of the counties of Billings, Stark and Mercer." Then, clearly, the title would have expressed two subjects; and, if the first was in no manner mentioned in the body of

the act, it might be rejected as surplusage, and the act as thus framed would not be vulnerable to the criticism that the subject of the act was not expressed in the title. But such was not the case. The change in the boundary lines was named simply as the means for the accomplishment of the main object of the act; *i. e.* the increase of the state revenues. This title was evidently the subject of some consideration. Had it been entitled simply an act to increase the boundaries of the counties named, not being a general law applicable to all the counties in the state, it would at once have met the objection—whether valid or not—that the change of boundaries of each county was a subject by itself, and hence the act violated the first provision of section 61 of the constitution. But by making the increase of state revenue the one subject and the change of boundaries simply the instrumentalities, that objection was avoided. Again, the members of the legislature and the people generally knew that the counties mentioned were situated in the western and grazing portion of our state. If the revenues of the state could be increased by increasing the boundaries of those counties,—and such was the promise in the title of the act,—the legislators as well as the people generally would be pleased to have it done, because it would bring the added revenue, without any increase of their burdens. But, if the act were simply to increase the boundaries of such counties, the act would present no such inducements to its passage. It has not been the custom in this state to create counties—as two of these would be under this act—180 miles in length. The fact that the act would necessarily increase the revenues of the counties named might not be a sufficient inducement for the creation of any such unwieldy municipalities. We think the title to the act in question is dangerously misleading, and presents a forcible instance of one of the evils which this constitutional provision was intended to prevent. In each case where this provision has been before us, we have held that it was mandatory alike upon the legislature and the courts, and, when the violation of the provision by the legislature is too plain to admit of doubt, we are reluctantly compelled to correct it. The order sustaining the demurrer is reversed, and the District Court is directed to enter an order overruling such demurrer. Reversed. All concur.

(79 N. W. Rep. 863.)

JOSEPH MILLER *vs.* A. V. SCHALLERN.

Opinion filed May 23, 1899.

Statute Mandatory Requiring Stamping of Ballots.

Section 524 of the Revised Codes considered, and the following provision thereof *held* not to be directory merely, but mandatory, viz: "In the canvass of the votes any ballot which is not indorsed as provided in this chapter by the official stamp and initials shall be void and shall not be counted."

Statute Not in Conflict with Constitution.

Held, further, that said statutory provisions are valid enactments, and are not repugnant to any provisions of the state constitution.

Illegal Ballots Rejected.

Certain ballots, as stated in the opinion, were voted and deposited in the ballot box, without having indorsed or written thereon the initials of an inspector or judge of the election precinct in which said ballots were cast. *Held,* that said ballots were illegal ballots, and that the board of canvassers could not lawfully canvass and count the same.

Error of Board of Canvassers.

Held, further, that the court below erred in its judgment sustaining the canvass of said votes which was made by the board of canvassers. The judgment is reversed, and the contest dismissed.

Appeal from District Court, Morton County; *Lauder,* J.

Election contest between Joseph Miller and A. V. Schallern. Judgment for plaintiff, and defendant appeals.

Reversed.

E. C. Rice, B. W. Shaw, and *Cochrane & Corliss,* for appellant.

The ballots not marked with the initials of the inspector or one of the judges of the election were illegally counted. § 524, Rev. Codes. This statute is mandatory. McCrary on Elections, § 190-191; *Slaymaker* v. *Phillips,* 42 Pac. Rep. 1049. *People* v. *Board,* 29 N. E. Rep. 332; *Peo.* v. *Person,* 19 N. Y. Supp. 297; *Parvin* v. *Wimberg,* 30 N. E. Rep. 790; *Horning* v. *Burgess,* 77 N. W. Rep. 446. It is also constitutional. *Slaymaker* v. *Phillips,* 40 Pac. Rep. 971, on rehearing 42 Pac. Rep. 1049. In the following cases the Court by going into the construction of the statute necessarily conceded the constitutionality thereof. *Parvin* v. *Wimberg,* 30 N. E. Rep. 789; *Horning* v. *Burgess,* 77 N. W. Rep. 446; *West* v. *Ross,* 53 Mo. 350; *Peo.* v. *Person,* 19 N. Y. Supp. 297; *Peo.* v. *Board,* 29 N. E. Rep. 327; *Lippincott* v. *Felton,* 39 Atl. Rep. 646; *Sweeney* v. *Hjul,* 48 Pac. Rep. 1036. Where illegal votes are cast and it is not shown for whom, the rule is to apportion them between the candidates in proportion to their respective votes in that precinct. McCrary on Elections, § 460-461; 6 Am. & Eng. Enc. L. 353; *Ellis* v. *May,* 58 N. W. Rep. 488; *Peo.* v. *Cicott,* 16 Mich. 315; *Moore* v. *Sharp,* 41 S. W. Rep. 587; *Heyfron* v. *Mahony,* 24 Pac. Rep. 93; *Russell* v. *McDowell,* 23 Pac. Rep. 183. There is authority for the proposition that in such case the vote of the entire precinct should be rejected. Paine on Elections, 513; *Heyfron* v. *Mahony,* 24 Pac Rep. 96; *Peo.* v. *Hanna,* 57 N. W. Rep. 738; *Phelps* v. *Schroda,* 26 O. St. 549-558. The ballots having identification marks on them are void. Sec. 559, Rev. Codes; *Sweeney* v. *Hjul,* 48 Pac. Rep. 1036; *Lauer* v. *Estes,* 53 Pac. Rep. 262; *Tebbe* v. *Smith,* 41 Pac. Rep. 454; *Peo.* v. *Board,* 50 N. E. Rep. 425; *Zeis* v. *Posswater,* 41 N. E. Rep. 796; *Parker* v. *Orr,* 41 N. E. Rep. 1002; *Vallier* v. *Brakke,* 64 N. W. Rep. 180; *Pennington* v.

Hare, 62 N. W. Rep. 116; *Ellis* v. *Glaser*, 61 N. W. Rep. 648. The ballots not marked in accordance with the statute are void. Ch. 76, Laws 1897; *Vallier* v. *Brakke*, 64 N. W. Rep. 180; *McKittrick* v. *Pardee*, 65 N. W. Rep. 23; *Church* v. *Walker*, 72 N. W. Rep. 101; Appeal of Gosnell, 40 Atl. Rep. 822; In re Vote Marks, 21 Atl. Rep. 962; In re Election Contest, 37 Atl. Rep. 523; *Waterman* v. *Cunningham*, 36 Atl. Rep. 395; In re Election Contest, 33 Atl. Rep. 703; In re Election Contest, 30 Atl. Rep. 955; *Tebbe*, v. *Smith*, 41 Pac. Rep. 454; *Slaymaker* v. *Phillips*, 42 Pac. Rep. 1049; *Sweeney* v. *Hjul*, 48 Pac. Rep. 1036; *People* v. *Moody*, 45 N. Y. Supp. 606; *People* v. *Common Council*, 46 N. Y. Supp. 701; *People* v. *Mehrer*, 46 N. Y. Supp. 898; *People* v. *Board of Canvassers*, 29 N. E. Rep. 327; *McMahon* v. *Polk*, 73 N. W. Rep. 77; *Whitman* v. *Zahonik*, 59 N. W. Rep. 57, 62. So of the ballots marked with a cross at the head of the Republican column and a cross in the square at the right of defendant's name, defendant is entitled to them. *Vallier* v. *Brakke*, 64 N. W. Rep. 180; *McKittrick* v. *Pardee*, 65 N. W. Rep. 23; *Church* v. *Walker*, 72 N. W. Rep. 101; *Dickerman* v. *Getsthorpe*, 47 Pac. Rep. 999; *State* v. *Franshaw*, 48 Pac. Rep. 1; *Heiskell* v. *Landrum*, 46 Pac. Rep. 120; *Curran* v. *Clayton*, 29 Atl. Rep. 930. Eight illegal votes were cast in Stevenson precinct, twenty votes were received without the initials of any election officer thereon. One of the judges of election in this precinct was a son of a candidate. These facts so impeach the good faith of the officers of election as to throw out the entire vote which was nearly solid for plaintiff. *Russell* v. *McDowell*, 23 Pac. Rep. 183; *Ferguson* v. *Allen*, 26 Pac. Rep. 570; *Londoner* v. *Peo.*, 26 Pac. Rep. 135-138. Where the returns are rejected as evidence each party must offer proof of all the votes that he claims in that precinct, and in the absence of any showing no votes will be counted for either party in such precinct. *Phelps* v. *Schroder*, 26 Ohio St. 558; *Russell* v. *State*, 11 Kan. 308; *Londoner* v. *Peo.*, 26 Pac. Rep. 138; *Attorney Gen'l* v. *McQuade*, 53 N. W. Rep. 944; 6 Am. & Eng. Enc. L. 353; Paine on Elections, § 592-596. Ballots counted for plaintiff, which were marked by a cross in the square at the head of the republican column and marked in no other way, were illegally counted, because Chap. 76, Laws 1897, authorizing the voter to vote in this way is unconstitutional, being repugnant to Sec. 61 Constitution. Chapter 76 is entitled "An act to amend section 491, Art. 4, Revised Codes of North Dakota of 1895, relating to elections." The title of Chap. 76 does not sufficiently state the subject of the act within the meaning of the constitution. Suth. St. Cr. § 101; *Webster* v. *Powell*, 18 So. Rep. 443; Matter of Knaust, 101 N. Y. 194; *Tingue* v. *Chester*, 101 N. Y. 303; *City* v. *Briggs*, 50 N. Y. 553; *State* v. *Commissioners*, 11 Pac. Rep. 902. The provisions of Chap. 76 relating to the mode of voting is not germaine to the subject set forth in the title, such subject being limited to the mode of preparing the ballot, and having no relevancy to the mode of voting it. Suth.

St. Const. § 87; *State* v. *Cornell,* 74 N. W. Rep. 433; *State* v. *Bowen,* 74 N. W. Rep. 615; *State* v. *Stewart,* 71 N. W. Rep. 998; *State* v. *Tibbets,* 71 N. W. Rep. 990; *German Am. F. Ins. Co.* v. *City,* 71 N. W. Rep. 995; *Lovenberg* v. *City,* 42 S. W. Rep. 1024; *O'Mara* v. *Wabash Ry. Co.,* 50 N. E. Rep. 821; *Ex parte Hewlett,* 40 Pac. Rep. 96; *State* v. *B. & M. Mut. Ben. Ass'n.,* 23 Kan. 499; *State* v. *Smith,* 35 Minn. 257; *State* v. *Madson,* 45 N. W. Rep. 856.

H. G. Voss, J. F. Philbrick, and *A. T. Patterson,* for respondent.

By section 121, the right to vote is a constitutional right in this state. Section 524, Rev. Codes, declaring that the failure of the inspector to place his initials upon the ballot destroys the vote, is void as curtailing a constitutional privilege. *Moyer* v. *Van De Vanter,* 41 Pac. Rep. 60; Opinion of Grossbeck, J., in *Slaymaker* v. *Phillips,* 42 Pac. Rep. 1049. Mere irregularities in the appointment of election officers or the misconduct of election officers will not justify a throwing out of their returns, unless fraud such as would change the result of the election is affirmatively shown. *Peo.* v. *Avery,* 61 N. W. Rep. 4; *Bell* v. *Faulkner,* 19 S. W. Rep. 480; 10 Am. & Eng. Enc. L. (2d Ed.) 670. There is no principle which can prevent the legislature from substituting any provision they please for any other provision, whether cognate or not, if the new section is not foreign to the subject indicated by the title of the law in which it is inserted. *Underwood* v. *McDuffee,* 15 Mich. 361; Cooley's Const. Lim. § 181; Suth. St. Ct. 135, note 7; *Denver Circle R. Co.* v. *Nestor,* 10 Colo. 403, 15 Pac. Rep. 714; *State* v. *Madson,* 45 N. W. Rep. 856.

WALLIN, J. This is an election contest, which originated in the County of Morton, and which involves the title to the office of county auditor of that county. The facts which we regard as decisive of the case are simple, and are not disputed. The plaintiff and defendant were the only candidates for said office at a general election held in said county in November, 1898, and the names of no other persons appeared on the official ballots as a candidate for said office. The votes cast at said election were canvassed by the county canvassing board, and as a result of such canvass it was found and determined by the canvassers that the plaintiff had received 706 votes for said office, and that the defendant had received 719 votes for said office, and thereafter a certificate of election in due form, based upon said official canvass, was delivered to the defendant by the county auditor. At the trial in the court below the ballot boxes used at said election in a number of the voting precincts of said county were brought into court and opened, and the ballots found therein were counted and considered in open court. As a result of such count and consideration, a number of important questions bearing upon the regularity of the election were developed; but, in the view which the Court has taken of the undisputed facts embodied in this record, it will be unnecessary, in this opinion, to

go further than to decide a single point which arises upon the action of the canvassing board in counting the ballots cast in one precinct, viz: the precinct of Antelope Creek.

Counsel concede that if the ballots cast in said precinct, and which were counted and credited to the plaintiff by the canvassers, were illegal ballots, and should not have been so counted or credited, the plaintiff is not entitled to said office, and that the defendant was properly given the certificate of election. As we have reached the conclusion, for reasons hereafter to be stated, that the ballots cast in the precinct of Antelope Creek were not official ballots, and hence that the same were improperly counted by the canvassers, we shall not have occasion, in view of the conceded facts, to discuss other questions presented by the record. With respect to the ballots cast at said precinct, the trial court finds the decisive fact in the following language: "That in Antelope Creek precinct 41 ballots were cast for plaintiff, and no ballot was cast for defendant; that none of said ballots had indorsed thereon, or had thereon at any place, the initials of the inspector, or of one of the judges of the election, in said Antelope Creek precinct, as required by section 515, Rev. Codes; that the board of county canvassers, in canvassing said votes, canvassed for and allowed to plaintiff all of said 41 votes in said Antelope Creek precinct, and canvassed for and allowed to defendant no vote in said Antelope Creek precinct." Upon the facts so found we are called upon to determine whether, under existing laws regulating the elective franchise in this state, a ballot not having upon it the initials of either the inspector or judge of the election precinct in which it was cast is a lawful ballot, despite such omission.

The decision of this question will involve a construction of certain sections of the state constitution, and chapter 8 of the Political Code, and particularly section 524 of the Revised Codes. Said section embraces the following provisions: In the canvass of the votes any ballot which is not indorsed as provided in this chapter by the official stamp and initials shall be void and shall not be counted." The legislative intent, as embodied in the statute, is clear and unmistakable; and hence it will be unnecessary, and would be improper, to resort to rules of construction in its interpretation. Its mandate is explicit and imperative. According to its terms, if its terms are to govern, it was the plain and obvious duty of the canvassers to reject, and not count, the ballots cast at the precinct of Antelope Creek. Nor can we discover any ground for construing this section as a directory enactment. Had the statute simply declared that the ballot should be authenticated as the official ballot by placing thereon the indorsements as required by section 515, Rev. Codes, and had stopped there, and had wholly omitted to declare the consequences of an omission to so indorse them, the duty of considering whether or not this provision was directory or mandatory might, in the supposed case, have been cast upon the courts. The case as it stands, however, forbids that this Court should enter

upon any such inquiry. The statute is clearly a mandatory enactment, and hence its requirements, however drastic, must be strictly enforced by the courts, unless the same are in conflict with some constitutional provision.

This brings us to the criticism of the statute which is made by counsel in behalf of the plaintiff. Counsel contend that the statute is unconstitutional, and cite in support of this point a case which is clearly authority for plaintiff's contention. See *Moyer* v. *Van De Vanter* (Wash.) 41 Pac. 60. And we may as well state here that the only other case where the constitutional question involved here is directly raised, which has come to our notice, is a case decided in Wyoming. See *Slaymaker* v. *Phillips*, 42 Pac. Rep. 1049. Turning to the state constitution, we find that section 121 thereof defines and describes the classes of persons who shall be deemed qualified electors. This is the entire scope and purpose of the section, and no attempt is made, in this provision of the organic law, either to regulate or restrict the exercise of the voting privilege which it confers. It gives the right to vote to certain classes of the inhabitants of the state, and there it stops. Surely no one can reasonably claim that the voters named and enfranchised by this section of the constitution may, without the passage of any statute whatever regulating the voting franchise, proceed to vote and have their votes counted. It needs no argument to demonstrate that this feature of the constitution is not self-executing. The only other section of the instrument which is at all pertinent to the present inquiry is section 129, which reads as follows: "All elections of the people shall be by secret ballot, subject to such regulations as shall be provided by law." The effect of these two sections of the constitution, when read together, is to confer upon certain inhabitants of the state the privilege of voting by a secret ballot; but the last clause of section 129 expressly looks forward to legislation, and declares that the voting privilege is to be regulated, and, in terms, is to be "subject to such regulations as shall be provided by law." This provision is not at all unusual in state constitutions. It is well known that the voting franchise is subject to legislative control to a greater or less extent in all the states of the United States. On the other hand, it is elementary that any law would be at once pronounced unconstitutional and void by the courts which has the effect of disfranchising a person to whom the constitution gives the right to vote. This principle was applied in a case decided by this Court. *State* v. *Denoyer*, 6 N. D. 586, 72 N. W. Rep. 1014.

But in the case at bar it is not claimed that the statute (section 524) in terms deprives any voter of his constitutional privilege, or that it necessarily so operated. On the contray, counsel's utmost contention is that an enforcement of the statute as it reads may in some cases operate, and in the case at bar will operate, practically to deprive electors of their constitutional right to vote, and to have their votes counted. But this cannot be made a test of the validity of any regulative statute. There are many regulative provisions

in election statutes the enforcement of which will and do operate to deprive voters of their privilege, and yet their constitutionality cannot be successfully challenged. Take, for example, the provisions of law requiring voters to register as a condition of voting. Such provisions are found in nearly all of the states, and a voter who neglects or refuses to comply with such provisions is not permitted to cast his ballot. In such cases the voter will invoke his constitutional rights in vain. The statutory regulation in the supposed case will operate to deprive him of his otherwise perfect right to vote. See *State* v. *Hilmantel,* 21 Wis. 574. For further illustration take a supposed case of an elector of this state who, before going to the polling place, has by some means supplied himself with an exact copy of the official ballot, and that he tenders this ballot to the precinct officers. Such ballot would, of course, be refused. If the voter saw fit to refrain from voting an official ballot, he would thereby lose his vote, and yet the ballot tendered in the case suggested would in all respects intelligently represent the wishes of the voter as to the candidates named in his ballot. Here, again, a merely statutory provision, which requires all voters to secure an official ballot from certain designated officers, would operate to deprive an elector of a right secured by the constitution.

Other illustrations will suggest themselves, but they are unnecessary, because the right of some legislative control over the voting privilege secured by state constitutions is conceded. In fact, there could be no valid election held under the constitution of this state without affirmative legislation providing the requisite machinery for holding the same. A mere naked constitutional right to vote is absolutely valueless, without some supplemental action on the part of the legislature. See 6 Am. & Eng. Enc. Law (2d Ed.) p. 563, note 4, and *Munroe* v. *Wells,* 83 Md. 505, 35 Atl. 142. But the case cited by plaintiff,—*Moyer* v. *Van De Vanter,* supra,—while conceding to the lawmaker the general right of legislative control, holds that the prohibition against the counting of votes on which the initials of a precinct official are not written is an unreasonable regulation, and, as it may possibly operate, in isolated instances, to disfranchise the voter, it is therefore unconstitutional and void. But, in our judgment, this reasoning is fallacious, and, moreover, trenches upon very dangerous ground. It proceeds upon the false notion that it is the province of the courts to enter the conceded domain of the legislature, and, upon a question of the expediency of a given regulative measure, substitute the judgment of the courts for that of the constitutional body which has the original right to make the regulation. Upon this point Judge Cooley voices the settled rule. In commenting upon the province of the judiciary, that learned jurist said: "It cannot run a race of opinions upon points of right, reason, and expediency with the lawmaking power." See Cooley, Const. Law (5th Ed.) p. 202, and note 1. See, also, 6 Am. & Eng. Enc. Law (2d Ed.) p. 1086, and cases cited in note 1.

In construing the prohibitory provisions contained in section 524 of the election law, it should be borne in mind that the same are vital parts of an elaborate and well-matured system of voting machinery. The characteristic and vital feature of the system is an official ballot. For cogent reasons, unnecessary to mention here, the legislature of this state, following the lead of many older states, where the matter had received long and conscientious consideration, has seen fit to adopt what is known as the "Australian Method" of regulating the elective franchise. As we have said, the characteristic and distinctive feature of this system is an official ballot. The state charges itself with the responsibility of furnishing the elector with such ballot, and in doing so announces to him in explicit terms that no other ballot can be placed in the ballot box or counted by the canvassers. In furtherance of this policy laws have been passed which are designed to place in the hands of every voter a genuine official ballot. Among other laws for this purpose is section 493, Rev. Codes, which reads as follows: "Each county auditor shall deliver or cause to be delivered by mail or other reliable method to the inspector of election in each precinct in his county the official ballot prepared by him at least twenty-four hours before the hour of opening the polls on election day. Such ballots shall be delivered in sealed packages marked on the outside, plainly designating the number of ballots inclosed and the precinct for which they are intended. He shall also deliver or cause to be delivered to such inspector, or, if that is impracticable, to one of the judges of election of such precinct, a stamp, with an ink pad, for the purpose of stamping each ballot with the words 'Official Ballot' and the name or number of the precinct, the name of the county and the date of the election." Section 515 is also pertinent in this connection, and is as follows: "The inspector or one of the judges of election shall deliver ballots to the qualified electors. Before delivering any ballot to an elector the inspector or judge shall print on the back and near the top of the ballot, with a stamp provided for that purpose, the designation 'Official Ballot,' and the other words provided for in section 493, and also write his initials thereon. Each qualified voter shall be entitled to receive from the judges one ballot."

The capital purpose of these statutes, manifestly, is to provide the voter with an official ballot, and to enable him to make sure that he gets such ballot. Provision is made, not only that an official shall deliver such ballot to the voter, but, with the same purpose in view, the law requires the official to indorse the ballot so delivered, not merely with an official stamp, with which he is provided, but with his own initials as well. This legislation, therefore, places it within the power of every voter to determine whether a ballot which is handed to him by a precinct officer is or is not an official ballot. If it is not stamped and initialed as the statute directs, it is not an official ballot, and hence cannot lawfully be voted, or, if voted, cannot be lawfully counted. A glance at the ballot will at once apprise the voter whether the ballot has been so indorsed as to be

made an official ballot. The state has therefore safeguarded the privilege of voting and the purity of elections, not merely by casting duties upon certain officers, but also by affording the voter an opportunity to see and know personally whether or not he is voting a lawful ballot,—*i. e.* an official ballot. If he neglects to notice whether the paper delivered to him is a lawful ballot, properly indorsed as such, and proceeds, either negligently or willfully, to deposit an unlawful ballot in the box, he must then accept the consequences of his own acts, and lose his vote. In such case, as in the illustrative examples already given, the loss of the vote is the result of the voters own acts. True, in the case at bar, the official is derelict also; but this does not alter the fact that the voter had the legal right to demand and receive an official ballot from the precinct officers, and, if he fails in exercising this privilege, he has himself to blame, nor can the official be saddled with the whole responsibility of the omission. See concurring opinion of O'Brien, J., in *People* v. *Board of County Canvasser* (N. Y. App.) 29 N. E. Rep. 329. Election laws are framed upon the supposition that the voters are sufficiently enlightened to know their provisions; nor can such laws be enacted upon the contrary without inviting anarchy and political chaos.

Counsel argue that the omission to indorse the officer's initials on the ballot, being the omission of an official act merely, ought not to operate to annul the vote. But, if this argument is sound as to the initials, we can see no reason why it is not equally valid as to the matter of printing on the ballots the words contained in the official stamp, which the state provides and requires to be stamped on the ballot before it is delivered to the voter. The statute is equally plain, and its mandate equally imperative, in the one case as in the other; and the object in view in these two provisions is one and the same. That object is—First, to give the voter an official ballot which he may surely know to be such; and, second, to enable the public to identify the actual ballot cast in the event of an election contest. But what would be the result to this carefully devised and well-approved election law if the courts should hold these statutory requirements to be not binding either upon the voter or upon the precinct officials; that is to say, not binding in the sense that their nonobservance would not invalidate the ballot? We think such holdings would very soon destroy all that is valuable in the notable ballot reform which is embodied in the Australian system of voting. If the methods of securing the sanctity of the ballot now devised by legislative wisdom are to be annulled by mere judicial construction, we can conceive of none others which could not as readily be disposed of by the same false method of reasoning. If experience should show that the provisions of section 524 are unnecessarily rigid,—we do not think it will,—then it will become the duty of the legislature to intervene and devise some different regulation of the elective franchise.

We do not care to further elaborate upon the issues. All that

the writer of this opinion can say in support of the constitutionality of the prohibitive features of section 524 of the Revised Codes has been anticipated, and much better set forth, in the very able opinion of the Court in the case of *Slaymaker* v. *Phillips*, above cited, and which is directly in point upon the constitutional question involved. The case is exhaustive, and buttressed by strong authority. It covers the whole field of pertinent discussion. Its reasoning is clear, and cogent, and all of its quotations from other cases are singularly apposite and convincing. The following authorities will be found to be much in point, although they are not cases in which the constitutional question here presented was directly drawn into discussion. In fact, it would appear that a doubt of the constitutionality of precisely similar statutes has never invaded the breasts of the learned judges whose opinions are cited below. See *People* v. *Board of County Canvassers* (N. Y. App.) 29 N. E. Rep. 332, 333; *People* v. *Person* (Sup.) 19 N. Y. Supp. 297; *Parvin* v. *Wimberg*, (Ind. Sup.) 30 N. E. Rep. 790-793; *Horning* v. *Burgess* (Mich.) 77 N. W. Rep. 446. In *Parvin* v. *Wimberg*, the Court said: "If a statute expressly declares any particular act to be essential to the validity of an election, or that the omission shall render the election void, the courts, whose duty it is to enforce the law as they find it, must so hold, whether the particular act in question goes to the merits, or affects the result of the election, or not; for such a statute is mandatory, and the court cannot enter into the question of its policy." Again, in *People* v. *Board of Canvassers*, supra, the Court say: "The law contemplates that the elector will not blindly rely upon any one, not even the election officers, in the preparation of the ballot. If he is handed an official ballot with a distinguishing mark upon it, or an improper indorsement, he is not obliged to vote it, but may procure a proper ballot." See, also, the work of Judge McCreary on Elections, § § 190, 191.

It follows, from the authorities we have cited, that the board of commissioners improperly canvassed and counted the ballots cast at said precinct of Antelope Creek; said ballots not having been indorsed with the initials of any of the precinct officers. The judgment of the court below must be reversed, and the court is directed to dismiss this contest. All the judges concurring.

(79 N. W. Rep. 865.)

W. F. LORIN *vs.* WILL H. SEITZ.

Opinion filed May 23, 1899.

Election—Validity of Ballots.

In this case precisely the same question is raised by the record which was involved and decided by this Court in the case of Miller v. Schallern (decided at this term), 8 N. D. .—, 79 N. W. Rep. 865. The decision in this case will be governed by the rule laid down in Miller v. Schallern.

Appeal from District Court, Morton County; *Lauder*, J.

Action by W. F. Lorin against Will H. Seitz. Judgment for plaintiff. Defendant appeals.

Reversed.

E. C. Rice, B. W. Shaw, and *Cochrane & Corliss*, for appellant.

H. G. Voss, J. F. Philbrick, and *A. T. Patterson*, for respondent.

WALLIN, J. This is an election contest and involves the title to the office of county superintendent of schools. The board of county canvassers found that the defendant was elected by a majority vote, and the certificate of election was accordingly delivered to the defendant. The trial court adjudged that the plaintiff received a majority of the legal votes, and that the certificate of election delivered to the defendant was illegal and void. From this judgment the defendant has appealed to this Court.

The record presents a number of questions bearing upon the regularity of the election in question, but it becomes necessary, in disposing of the case, to determine only a single question, which counsel have conceded to be decisive of the result. The facts in this record grow out of an election held in November, 1898, in the County of Morton, which election is the same as that involved in the case of *Miller* v. *Schallern* (decided at this term, and the opinion in which is handed down with this opinion), 79 N. W. Rep. 865. In *Miller* v. *Schallern* this Court held, and it was the pivotal point in the case, that certain ballots, which were cast for the plaintiff and were credited to him by the canvassers, were (under section 524, Rev. Codes) illegal ballots, because they were minus the initials of an election precinct officer, and hence that such ballots were improperly credited to the plaintiff. A precisely similar state of facts is presented by the record in this case. In this case a portion of the ballots cast for the plaintiff (sufficient in number to determine the result of the election) were placed in the ballot box without being indorsed with the initials of any precinct officer. Upon the rule laid down in *Miller* v. *Schallern*, such ballots were illegal ballots, and cannot be counted for the plaintiff. Rejecting such ballots, the defendant received a majority of the legal votes cast at the election, and is therefore entitled to said office, and was properly given the certificate of election.

The grounds upon which we place this ruling are fully set forth in the case cited, and we shall not, therefore, repeat in this opinion what was there said. The judgment of the court below must be reversed, and that court is directed to dismiss this contest. All the judges concurring.

(79 N. W. Rep. 869.)

CARL A. KAEPPLER *vs.* RED RIVER VALLEY NATIONAL BANK.

Opinion filed May 27, 1899.

Complaint Charging False Imprisonment and Malicious Prosecution—Motion for Verdict.

Where a complaint in an action states, in a single count, facts that constitute a cause of action for false imprisonment and also for malicious prosecution, and where plaintiff, at the close of the testimony, moved for a directed verdict in his favor upon stated grounds, and which motion should have been sustained if the action was false imprisonment, but should have been denied if the action was malicious prosecution, and where, immediately upon the denial of such motion, plaintiff requested an instruction to the jury, which was given, and which limited any recovery in the case to damages for malicious prosecution, *held*, that plaintiff could not urge in this Court, as ground of reversal, that the trial court erred in denying the motion for verdict.

Improper Cross Examination.

For the error of the trial court in permitting an improper cross-examination, as set forth in opinion, the case is reversed.

Affidavit of Arrest Insufficient if Made on Information and Belief.

An affidavit which is used as the basis for a warrant of arrest in insolvency proceedings, and in which the probative facts by which it is sought to establish the existence of the ultimate facts required by the statute are alleged upon information and belief, but no grounds for such information and belief are stated, is insufficient to give the court jurisdiction to issue a warrant of arrest in that particular case.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Carl A. Kaeppler against the Red River Valley National Bank of Fargo. Judgment for defendant, and plantiff appeals.

Reversed.

H. R. Turner and *Morrill & Engerud*, for appellant.

The order of arrest was void, section 6013, Rev. Codes, under which it was procured, is unconstitutional in so far as it authorizes the arrest of an alleged insolvent. Art. I, Sec. 15, Const; *Resser* v. *Hoyt*, 18 N. W. Rep. 611. The jurisdiction to arrest on civil process except in specified instances is taken away. The power is exceptional and extraordinary, depending upon the statutes granting and limiting the exercise of the power. When the power is attacked the burden lies on the party who seeks to uphold it to show clearly that the statute has been strictly complied with. *Stafford* v. *Low*, 20 Ill. 152; *Bryan* v. *Congdon*, 53 U. S. App. 505; *Mudrock* v. *Killips*, 28 N. W. Rep. 66; *Miller* v. *Munson*, 34 Wis. 579; *Spice* v. *Steinruck*, 14 Ohio St. 213; *Sheridan* v. *Briggs*, 19 N. W. Rep. 189; *Marble* v. *Curran*, 29 N. W. Rep. 725; *Wachsmith* v. *Bank*, 21 L. R. A. 278; Estes Pl. § 3966. The affidavit for arrest was insufficient in its statement of facts to confer jurisdiction. *Peo.* v. *Recorder*, 6 Hill. 429; *Hauss* v. *Kohlar*, 25 Kan. 640; *Matoon* v. *Eder*, 6 Cal. 57-60. The affidavit being insufficient, the annul-

ment of the proceeding made it void ab initio and authorized action for false imprisonment. *Bryan* v. *Congdon,* 43 U. S. App. 505; *Fischer* v. *Langbein,* 103 N. Y. 84; *Day* v. *Bach,* 87 N. Y. 56; *Kerr* v. *Mount,* 28 N. Y. 659; 19 Am. & Eng. Enc. L. 516, and n.; Addison, Torts, § 831 and § 921. Advice of counsel is only competent in a case of this kind, when shown to rebut malice. *Brewer* v. *Jacobs,* 26 Fed. Rep. 217; *Hamilton* v. *Smith,* 39 Mich. 232; *Wyatt* v. *Corey,* 76 Me. 87; *White* v. *Carr,* 36 Am. Rep. 353; *Sparlinger* v. *Conway,* 12 Mo. App. 510; *Collard* v. *Gay,* 1 Tex. 494; *Wills* v. *Noyes,* 12 Pick. 324. And the jury must take into consideration in determining the good faith of the defendant the relations existing between defendant and the attorney whose advise is sought in regard to the proceeding in question. *Sherburne* v. *Redman,* 51 Wis. 474; *Platt* v. *Brannsdorf,* 40 Wis. 107; *Murphy* v. *Larson,* 77 Ill. 172; *Hamilton* v. *Smith,* 39 Mich. 222; *Brewer* v. *Jacobs,* 26 Fed. Rep. 217. The cross-examination of the witness Wilson, was permitted to go entirely outside the matters inquired of by plaintiff. This was error. 1 Bish. Ev. 586; *Bell* v. *Prewitt,* 62 Ill. 362; *White* v. *McLean,* 47, How. Pr. 193; *First National Bank* v. *Smith,* 65 N. W. Rep. 439; *Railroad Company* v. *Stimson,* 14 Pet. 448; 8 Enc. Pl. & Pr. 102. If defendant could prove probable cause at all, as rebutting malice, it should have been confined to the proof of only such facts and circumstances as were known to it at the time of procuring the arrest. *Brown* v. *Smith,* 83 Ill. 291; *Turner* v. *O'Brien,* 7 N. W. Rep. 850.

Ball, Watson & Maclay, for respondent.

The action is for false imprisonment. The arrest complained of was made on legal process, out of a court having jurisdiction both of the parties and the subject matter. The allegation that the arrest was made maliciously and without probable cause, does not constitute a part of the cause of action. *Murphy* v. *Martin,* 16 N. W. Rep. 603; *King* v. *Weed,* 51 N. W. Rep. 1011; *Whitten* v. *Bennet,* 86 Fed. Rep. 405. The process upon which plaintiff was arrested was regular and valid. Even slight and inconclusive proof, while it may not be sufficient to sustain the process against direct attack or upon appeal, will furnish justification for the issuance of the process in an action for false imprisonment. *Landt* v. *Hills,* 19 Barb. 293; *Miller* v. *Adams,* 7 Lans. 133, 52 N. Y. 409; *Van Alstyne* v. *Erwine,* 1 Kern 34; *Skinnion* v. *Kelly,* 18 N. Y. 355; *Ward* v. *Cozzens,* 3 Mich. 252; *Johnson* v. *Maxon,* 26 Mich. 129; *Johnson* v. *Mortin,* 53 N. W. Rep. 816; *Dusy* v. *Helm,* 59 Cal. 188. The fraud mentioned in Art. 1, Sec. 15, Const., may be fraud in incurring the debt or fraud in the endeavor to evade its payment. Section 6013, Rev. Codes, is not unconstitutional. Cooley's Const. Lim. (4th Ed.) 422; *Powers* v. *Davenport,* 7 S. E. Rep. 747; *Ex parte Bergman,* 4 Pac. Rep. 209; *Dummer* v. *Mungresser,* 65 N. W. Rep. 564. Even if the statute were unconstitutional an action for false imprisonment would not lie for an arrest made

under its provisions by process otherwise regular. *Halleck* v. *Dominy*, 69 N. Y. 238; *Brooks* v. *Mangan*, 46 N. W. Rep. 633; *Henke* v. *McCord*, 7 N. W. Rep. 623; *Gifford* v. *Wiggins*, 52 N. W. Rep. 904; *Barker* v. *Stetson*, 7 Gray 53; *Wheaton v. Beecher*, 13 N. W. Rep. 769. In actions for false imprisonment and malicious prosecution the defendant is entitled to ask the court to resolve reasonable doubts in his favor, and not in favor of prunitive or exemplary damages. *Jones* v. *King*, 33 Wis. 422; 1 Graham & W. on New Trials, 503. No actual or special damages were alleged or proved. The right to nominal damages where such damages do not carry costs will not authorize reversal. Therefore error, if any in denying appellant's motion for directed verdict (the jury found for respondent), was harmless. 8 Am. & Eng. Enc. L. (2d Ed.) 560; 1 Suth. Dam. 815; Woods Mayne on Dam. 10; *Martin* v. *Ry. Co.*, 54 Pac. Rep. 696; *Jones* v. *King*, 33 Wis. 422; *Lanbenheimer* v. *Mann*, 19 Wis. 519; *Howe* v. *Cochrane*, 50 N. W. Rep. 368; *Dunlap* v. *Babb*, 59 Tenn. 315; *McConaghy* v. *McMullen*, 27 Wis. 73. Where no actual damages are alleged or proved no exemplary damages can be recovered. *Scheppel* v. *Norton*, 16 Pac. Rep. 804; *Schwartz* v. *Davis*, 57 N. W. Rep. 849; *Kuhn* v. *Railway*, 37 N. W. Rep. 116. The instruction as to the advice of counsel was correct. 2 Thomp. Trials, 1638, 1639. The questions propounded to Wilson in cross examination were proper. 8 Enc. Pl. & Pr. 109, 110, n. 1.

BARTHOLOMEW, C. J. Plaintiff brought an action, as he claims, and as the Court instructed the jury, under section 4971, Rev. Codes, which reads: "Every person who suffers detriment from the unlawful act or omission of another may recover from the person in fault a compensation therefor in money, which is called damages." Under that section it is clear that an action might be brought for false imprisonment or for malicious prosecution. The facts were that the defendant caused the arrest of plaintiff in insolvency proceedings in the District Court of Cass county, and the defendant was held by the sheriff under such arrest for about 30 hours, and then released at the request of defendant, and later, upon plaintiff's application, the order of arrest was vacated. In this Court both parties state that the action is for false imprisonment. If the complaint contains any sufficient allegation that the warrant of arrest was illegal, or that the allegations in the affidavit upon which the warrant was based were false, then we think it otherwise broad enough to cover a case of false imprisonment. It certainly covers a case for malicious prosecution. It is alleged that the defendant herein "willfully and maliciously, and with intent to injure the plaintiff, made affidavit," etc., and that "in so doing the defendant acted maliciously, and without probable cause, or any cause whatever." After the testimony was closed the record shows the following proceedings: "The plaintiff thereupon moved the Court to direct the jury to return a verdict for the plaintiff against the

defendant, but to leave it to the jury to ascertain and determine the amount of damages which the plaintiff is entitled to recover, under proper instructions, on the ground that the evidence in this case is undisputed that the arrest of the plaintiff was made by the defendant under process which is invalid, and furnishing no justification for the arrest, for the reason that the affidavit upon which the warrant was obtained does not state any facts sufficient to justify the issuance of a warrant, and is so entirely deficient of statements of facts as to give the Court no jurisdiction to issue such process, and, further, that the statute (section 6013 of the Revised Codes) is unconstitutional and void, in so far as it authorizes the issuance of process for the arrest of an alleged insolvent. Motion is denied, and plaintiff excepts. Thereupon the plaintiff submitted to the Court the following requests for instructions to the jury." And the third instruction requested by plaintiff and given by the Court states: "In order to recover, the plaintiff must also show that the arrest was malicious,"—and then proceeds to define "malice."

We have quoted thus much from the record because it is material to ascertain, if we can, upon what theory the plaintiff was seeking to recover. It may be conceded that, under the averments of the complaint, he had a right to recover either for false imprisonment, or malicious prosecution, or both. See *Wagstaff* v. *Schippel*, 27 Kan. 450. But it is very clear that the ruling of the Court on the motion for a directed verdict was right, if plaintiff was seeking to recover as for malicious prosecution, because, however defective the affidavit for the order of arrest may have been, or however unconstitutional the law authorizing the arrest may be, plaintiff could not recover for malicious prosecution unless the defendant was actuated by legal malice in making the affidavit; and, while a defective affidavit might be regarded as showing want of probable cause, which in turn might be some evidence of malice, yet there was so much evidence in the case tending to show absence of all malice that the Court could not take that question from the jury. On the theory of a recovery for false imprisonment, plaintiff was entitled to a directed verdict, if the affidavit for order of arrest was so defective that it gave the Court no jurisdiction, or if the statute authoring the arrest be unconstitutional. But, immediately upon the denial of plaintiff's motion, he requested a charge to the jury, and the Court gave it, which necessarily confined the recovery in the case to damages for malicious prosecution. From these facts we are warranted in holding either that he presented his motion on the theory of a recovery for malicious prosecution, in which case it was properly denied, or that, if he presented it on the theory of a recovery for false imprisonment, he at once abandoned that ground, and limited his right to recover to a recovery for malicious prosecution. If the latter be true, then the motion must be held waived for all purposes, and cannot be urged in this Court. In either view, this assignment of error must be overruled.

But there are certain assignments of error relating to the admis-

sion of testimony that, we think, must be sustained. The first witness called by plaintiff was the sheriff who made the arrest. The testimony elicited by plaintiff was purely of a formal character. The witness was shown the warrant of arrest, and testified that under the warrant he arrested the plaintiff, and held him in custody for about 30 hours. Nothing further was asked by plaintiff. The warrant of arrest also directed the sheriff to seize the property of the plaintiff. On cross-examination this witness, over the repeated objections of plaintiff that it was not proper cross-examination, was permitted to testify as to what property he seized, where he found it, what condition it was in, and what plaintiff said as to where it was and how it came to be there. Of course, the object of this cross-examination was to show that the plaintiff was trying to conceal his property, and that, therefore, defendant had probable cause for causing his arrest. This was a vital point in the defense, but had been in no manner adverted to on the direct examination. We know that much discretion should be given to trial courts in matters of the kind, but still it is a legal discretion, and subject to control. Evidence of this damaging character, coming from the lips of the party's own witness, must have been highly prejudicial. It was outside the ordinary limits of cross-examination, and its admission was reversible error, which necessitates a new trial.

But, inasmuch as it is clear, from what counsel say in the argument of this case, that upon a new trial the plaintiff will rely entirely upon false imprisonment, and as both parties have discussed fully the matter of the sufficiency of the affidavit for an arrest in this case, and as that will necessarily be to some extent a controlling feature in the new trial, it is proper for us to express our views upon the sufficiency of the affidavit, leaving the question of constitutionality of the act authorizing the arrest until it is necessarily before us. If the facts stated in the affidavit were not such as to call into exercise the jurisdiction of the District Court, then, notwithstanding the order of arrest may have been made, the sufficiency of the affidavit was never judicially passed upon, because the Court had no jurisdiction to act in that particular case. Hence the warrant of arrest would be illegal, and plaintiff would be entitled to nominal damages, at least. *Wachsmuth* v. *Bank* (Mich.) 56 N. W. Rep. 9; *Fischer* v. *Langbein*, 103 N. Y. 84, 9 N. E. Rep. 497; *Bonesteel* v. *Bonesteel*, 28 Wis. 245; *Marble* v. *Curran*, 63 Mich. 283, 29 N. E. Rep. 725; *Mudrock* v. *Killips*, 65 Wis. 622, 28 N. W. Rep. 66; *Bryan* v. *Congdon*, 29 C. C. A. 670, 86 Fed. Rep. 221; *Whitlock* v. *Roth*, 5 How. Pr. 143. On the other hand, if the affidavit, though defective, be sufficient to call into action jurisdiction of the court, and an order of arrest be made, then the sufficiency of the affidavit has been judicially determined, and the order of arrest protects the affiant, unless the statements in the affidavit were false, and the affiant had no probable cause to believe them to be true. *Johnson* v. *Martin*, 95 Mich. 1, 53 N. W. Rep. 816; *Fischer* v. *Langbein*, supra; *Spice v. Steinruck*, 14

Ohio St. 213; *Dusy* v. *Helm*, 59 Cal. 188; *Miller* v. *Brinkerhoff*, 4 Denio, 120. Section 6013, Rev. Codes, reads: "At the time of the filing of the petition in insolvency either by the debtor or creditor, or at any time thereafter, if it shall appear that there is probable cause for believing that the debtor is about to leave the state, or to remove or conceal his property, or to make any fraudulent conveyance or disposition thereof, or that the best interests of the estate demand such action, the Court may issue a warrant to the sheriff, commanding him to arrest and safely keep the alleged debtor, unless he shall give an undertaking to the satisfaction of the Court for his appearance from time to time as required by the court until its decision upon the petition or until its further order, and forthwith to take possession provisionally of all the property of the debtor and safely keep the same until the further order of the court, or to take possession of the property as aforesaid without arresting the debtor." It will be noticed that no arrest can be made by reason of anything that is accomplished. If an act, however fraudulent, be done, no purposes of the insolvency proceedings can be served by an arrest; but, when anything is about to be done that will injuriously affect the estate or interests of the creditors, a court may put forth its powers to prevent the accomplishment of such result. The statute is entirely preventative "If it shall appear," etc., is the language of the statute. As the warrant of arrest is issued by the Court, the facts upon which it is based must be made to "appear" to the Court. In what manner this statute does not say; but, as the statute contemplates the most drastic measure known to civil actions, it will be conceded that it must appear in some of the methods by which proofs of facts are presented to a court. Under the authorities already cited, the degree of proof is not material, provided there be legal evidence tending to show that there is probable cause for believing that the ultimate facts required by the statute do exist.

In this case the proof was by affidavit. We need not reproduce the affidavit, as it is long. It was made by the president of the defendant. In our judgment, such affidavit contains no allegations whatever tending to prove that the insolvent was about to leave the state, or about to conceal his property, or about to fraudulently transfer the same, except such allegations as are made upon information and belief. Is such an affidavit a sufficient basis for an arrest in this state? As the application for the arrest is an ex parte proceeding, and as it is in derogation of personal liberty, the least that can be required is that the applicant make an undoubted prima facie case. Upon well-settled general principles this cannot be done, in the absence of statutory sanction, by an affidavit based upon information and belief, for the very evident reason that such affidavit is not competent evidence. It is mere hearsay. If the affiant were on the stand, he would not be permitted to testify to any such matter, and he certainly should be equally restricted in an ex parte affidavit, where he is subjected to no cross-

examination; and so are the authorities. *Brown* v. *Kelley*, 20 Mich. 27; *Sheridan* v. *Briggs*, 53 Mich. 569, 19 N. W. Rep. 189; *Griswold* v. *Sweet*, 49 How. Pr. 171; *Dreyfus* v. *Otis*, 54 How. Pr. 405; *Hauss* v. *Kohlar*, 25 Kan. 640. Some of the facts in this case will illustrate the great danger of abuse that would inevitably attend the practice of allowing arrests in civil cases upon affidavits made on information and belief. Plaintiff was a wholesale fruit dealer in Fargo. He did his banking business with defendant, and had a line of credit there. About July 1, 1897, he applied for an additional credit in an amount sufficient to pay for a car load of lemons and a car load of melons that had been shipped to him, and drafts were drawn on him with the bills of lading annexed. The additional credit was granted upon the plaintiff's statement that he would dispose of the goods for the approaching Fourth of July trade, that the sales would be for cash, and he would immediately deposit the proceeds with the defendant bank. The affidavit in this case, made some two weeks subsequently, alleged on information and belief that plaintiff had disposed of the goods, but had failed to deposit the proceeds. This was adduced as evidence that plaintiff was concealing his assets. When the assignee in insolvency took possession of plaintiff's estate, we learn, from the evidence, that he found the car load of melons still standing on the track, and the carload of lemons in the basement of plaintiff's warehouse, with few, if any, of them gone.

But it is urged that an affidavit upon information and belief is, and should be held, sufficient in this case, because our statute upon arrest and bail in terms permits an arrest upon an affidavit of that character. Section 5306, Rev. Codes. We need not, in this case, intimate whether or not it would be the duty of a court to construe that provision into the insolvency law, when no such language is used. That section provides that, when the affidavit is made upon information and belief, "it must state the facts upon which the information and belief are founded." The affidavit in this case entirely fails to comply with this requirement. The reason for this requirement is evident. The application for the order of arrest is addressed to the judicial discretion of the court. If, when the sources of information are disclosed, it appears that the affidavit of the party giving the information might readily be procured, a court will not, ordinarily, grant the order, unless such affidavit be filed. If, on the other hand, the sources of information are such as to leave no reasonable doubt of the correctness of such information, a court may, under the statute, act upon such affidavit. The grounds of belief must be stated, in order to enable the court to determine whether or not such belief is well founded and reasonable . *Moore* v. *Calvert*, 9 How. Pr. 474; *Dreyfus* v. *Otis*, 54 How. Pr. 405; *Bank* v. *Loucheim* (Sup.) 8 N. Y. Supp. 520; *Whitlock* v. *Roth*, 5 How. Pr. 143; *Crandall* v. *Bryan*, 15 How. Pr. 48; *Bank* v. *Lumley*, 28 How. Pr. 397; *Pierson* v. *Freeman*, 77 N. Y. 589; *Hackett* v. *Circuit Judge*, 36 Mich. 334.

As the affidavit in this case contained no competent evidence tending to establish the ultimate facts which the statute says must exist, the Court had no jurisdiction to act in the case. Reversed. All concur.

(79 N. W. Rep. 869.)

EDWIN C. MCHENRY, *et al. vs.* KIDDER COUNTY, N. D.

Opinion filed May 20, 1899.

Quieting Title—Tax Sales.

Section 5904 of the Revised Codes construed, in connection with section 79, c. 126, Laws 1897, and *held*, in an action brought to quiet title, that the Court may adjudicate upon the validity of any liens which are derived through or under a tax sale or sales, but liens not so derived cannot be passed upon in such an action.

Liens Not Based Upon Tax Sales Not Adjudicated.

When the purpose of an action to quiet title is to determine adverse rights in land growing out of a tax sale, the word "lien," as it occurs in the complaint, should be restricted to such liens as the Court may lawfully pass upon in such an action, viz: to liens based upon tax sales; and, therefore *held*, that liens not based upon tax sales which may be alleged in such answer will not be adjudicated by the courts against the consent of the plaintiff, and that the plaintiff's dissent may be indicated by demurring to the answer.

Statutory is Exclusive Remedy for Collection of Taxes.

Under the revenue laws of this state, now existing, the summary processes provided by statute for the enforcement of taxes are an exclusive remedy, and it is accordingly *held*, that an action in equity in the nature of a suit to foreclose a mortgage does not lie to foreclose a lien upon land created by a tax levy.

Act of Legislature Annulled Prior Tax Sale.

In a case where lands had been sold at the annual tax sale in 1895, in satisfaction of taxes levied against them which became delinquent in 1895 and prior years, and were never redeemed from such sale, *held*, that all the rights acquired by the state under such tax sale were voluntarily surrendered by the state, by virtue of an act of the legislature embraced in chapter 126, Laws 1897, entitled "An act to enforce the payment of taxes which became delinquent in and prior to the year eighteen hundred and ninety-five." The state, through this enactment, voluntarily accepted in lieu of its rights acquired in the lands bid in by the state, the right to enforce the original tax upon which such sales were made. This action of the state, through the legislature, necessarily operated to annul such sales, and to wholly release the lands so purchased from the consequences of such sale.

Appeal from District Court, Kidder County; *Winchester*, J.

Suit by Edwin H. McHenry and Frank G. Bigelow, receivers of the Northern Pacific Railroad Company, against the County of Kidder and the State of North Dakota. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Charles H. Stanley (*Fred A. Baker,* of counsel), for appellants.

James B. Kerr, for respondents.

WALLIN, J. This is an action to quiet title, brought by the receivers of the Northern Pacific Railroad Company against the County of Kidder and the State of North Dakota. In their complaint the plaintiffs allege their ownership in fee, as such receivers, of certain lands in Kidder county, described in the complaint, which lands are conceded to be a part of the land grant of said railroad company. The complaint alleges "that the said defendants, the State of North Dakota and County of Kidder, North Dakota, claim some title or interest in or lien upon said lands adverse to these plaintiffs, that the claims of the said defendants are without any right whatever, and that said defendants have no right, title, interest, or lien in or to or upon the said described lands, or any of them." The complaint demands that the defendants be required to set forth the nature of their claims, to the end that such claims may be determined by the court, and, finally, that the court shall adjudge that the defendants have no interest, title, right, lien, or lawful claim in or to the said lands, or any of them, and that the plaintiffs' title to said lands be adjudged valid. To this complaint the defendants answered, admitting, in effect, that the lands in question were a part of the land grant of said railroad company, and that the plaintiffs, as such receivers, owned said lands in fee simple, unless the defendants owned the same by virtue of the tax proceedings, which are set out in the answer; and all of the defendants' claims to said lands are based exclusively upon such tax proceedings. The answer alleges the regular levy of territorial, state, county, township, and school district taxes against the lands described in the complaint for the years 1889, 1892, 1894, 1895, and 1896, and that said taxes have not been paid. Said answer further alleges title to and ownership of said lands in the State of North Dakota, and bases such title and ownership upon a tax sale thereof, which tax sale is set out as follows in the answer: "That in the year 1895 the lands in question in this suit, and all other lands in said county on which the taxes for 1889 and 1894 had not been paid, were regularly sold at a tax sale in said County of Kidder for the taxes of 1889 and 1894, and the lands in question in this suit were regularly bid in by the State of North Dakota, and the state now holds the title so acquired in trust for itself and for the County of Kidder, and, for the several civil townships and school townships or districts of said county." The defendants claim that the facts averred in their answer, which we have above epitomized, constitute a proper counterclaim in this action, and upon that assumption the defendants demand affirmative relief against the plaintiffs as follows: "(1) That the said taxes levied in the years 1889, 1892, 1894, 1895, and 1896 be decreed to be a valid and perpetual lien and charge upon the lands in the suit. (2) That the taxes levied in 1889, 1892, and 1894 against the lands

be adjudged and declared to be valid delinquent taxes, for which said lands are subject to sale under and in pursuance to an act entitled 'An act to enforce the payment of taxes which became delinquent in and prior to the year 1895.' [Laws 1897, p. 76] (3) That said taxes levied in 1895 and 1896 against said lands be declared to be good and valid taxes, and good and valid delinquent taxes, for which said lands are subject to sale under an act entitled 'An act prescribing the mode of making assessments of property,' etc., approved March 8, 1897; also, that said taxes of 1895 and 1896 be declared to be valid subsequent taxes within the meaning of sections 18, 19, and 20 of the act relating to the enforcement of delinquent taxes, referred to in paragraph 2 of the prayer for relief." Section 4 of the prayer is in the following language: "That the said taxes for the years 1889, 1892, 1894, 1895, and 1896, and the penalty and interest thereon, may be declared and decreed to constitute a lien upon the said several parcels of land in the nature of a mortgage lien, and that foreclosure of the same may be had by a sale of the lands in the same manner and form as a mortgage lien may be foreclosed under the statutes of the State of North Dakota and the rules and practice of this Court; all the statutory rights and privileges of the plaintiffs as taxpayers being preserved to them." Section 5 asks that the said taxes may be decreed to be a first lien and charge upon moneys in the hands of said receivers. This is followed by a prayer for general relief. To this answer the plaintiffs interposed a general demurrer for insufficiency, and the trial court, after hearing counsel upon the issues raised by the demurrer, sustained such demurrer, and by its order directed that judgment be entered in favor of the plaintiffs, adjudging said plaintiffs to be the owners of the lands described in the complaint, free from any right, title, estate, or interest in said defendants, or either of them, and free from any lien arising by virtue of any tax sale claimed on the part of the said defendants, or either of them. Judgment was entered pursuant to the terms of said order, and the defendants appeal therefrom to this Court.

In disposing of the various questions presented by the record, it will be necessary to take up and settle a preliminary question of practice which counsel have discussed in their briefs. It is this: Is it the duty of this Court, in an action to quiet title, such as this, to consider and pass upon any lien which may be set out by answer, but which does not arise from, or in consequence of, any tax sale of the lands involved? The proper solution of this question involves a construction of section 5904 of the Revised Codes, in connection with section 79 of chapter 126 of the Laws of 1897. This Court has had occasion to hold, in an action brought under the provisions of section 5904, supra, that mere liens, as distinguished from adverse estates and interest in lands, cannot, in the absence of consent, be adjudicated. This holding was upon the theory that such an action is peculiar in its nature, and must be governed by the letter of the statute, which creates this form of action and dis-

tinguishes it from all other actions which may be instituted under the Codes of Procedure existing in this state. See *Power* v. *Bowdle*, 3 N. D. 107, 54 N. W. Rep. 404, citing *Hooper* v. *Henry*, 31 Minn. 264, 17 N. W. Rep. 476, and *Mitchell* v. *McFarland*, 47 Minn. 535, 50 N. W. Rep. 610. And see, also, *Buxton* v. *Sargent* 7 N. D. 503, 75 N. W. Rep. 812. In the case last cited this Court said: It is true that, when both of the litigants actually try in such an action a question of lien, the courts will not refuse to pass upon that question, but will, on the contrary, render judgment thereon the same as if it had been a proper issue in the case." In *Power* v. *Bowdle* the following language was used by the Court: "Where a defendant elects to have his own case determined in such action, and sets out the facts of his case, and asks judgment upon such facts, and the Court, without objection, pronounces judgment thereon upon the merits, it will then be too late for the defendant to raise any technical objection based upon the form of the action." We think the case at bar does not come within the exception to the rule as stated in the cases cited. In this case there has been no trial upon the facts and merits, and the trial court did not, as in the cases cited, proceed to determine the matters and liens alleged in the answer, and to decide the same upon their merits, without objection, as was done in those cases. In the case at bar the plaintiffs, by demurring to the answer, met and challenged the right of the defendants to litigate the various liens alleged in the answer in this action. In this we recognize no element of consent, but, on the contrary, we see only dissent and challenge.

But counsel contend that the plaintiffs, by the express terms of their complaint, have invited the defendants to answer and set out all their claims to the land, including any liens which they have, or claim to have, upon the lands in question. To this proposition we cannot yield an assent. The plaintiffs have, it is true, invited the defendants to set out any liens which they have or claim, as well as their claims of title to the lands; but we think the language of the complaint must be construed with reference to the statute under which the complaint was obviously drawn, viz: with reference to section 79 of the act of 1897, which section is found on page 286 of the Laws of 1897. The surroundings of the case, as well as the record, show that the purpose of the plaintiffs in bringing this action is to determine the rights of the defendants in and to the lands in question arising out of a certain tax sale thereof which was made by Kidder county in the year 1895, as stated in the answer. It is entirely clear to this Court that this action would never have been instituted but for the fact of such tax sale. Under the provisions of section 79, above cited, the court is given authority, in this form of action, to adjudicate with respect to any lien which a defendant sets out in his answer, provided, always, that such lien arises upon a tax sale. As we have said, the action was clearly brought under this statute, for the very purpose of determining any adverse title or lien which the defendants might have or claim

under said tax sale. It being brought for that purpose, and none other, it comes within the purview of the statute; and the language of the complaint, therefore, should be interpreted with reference to the statute. When so interpreted, the word "lien," as used in the complaint, must be confined to the only lien or liens which the Court has power to investigate in this class of actions,—*i. e.* liens arising upon tax sales. It follows, from this view of the complaint, that the plaintiffs have never invited the defendants to plead in their answer any liens whatsoever other than such as may have arisen upon the sale of their lands for taxes. Hence this case does not in any aspect present a case where the parties are voluntarily litigating questions not within the purview of the statutes regulating this form of action. It follows, from this holding, that for technical reasons the alleged liens upon the lands in question which would result from a valid levy of the taxes for the five years referred to in the answer cannot be considered, or their validity or invalidity determined, in this action.

But we hold, further, that the same practical result would be reached in any form of action, and that without reference to technical considerations. As has been seen, the defendants ask, as a part of their relief, that all the alleged liens of the several tax levies in question be adjudged to be valid and existing liens upon the lands; but this is only preliminary to the further prayer, "that foreclosure of the same may be had by a sale of the lands in the same manner and form as a mortgage lien may be foreclosed under the statutes of North Dakota." This demand for relief, is novel in this jurisdiction, and we are entirely clear that no such relief should be granted. Counsel have cited no authority in point in support of this branch of their prayer, and from our standpoint the remedy by action in the nature of a mortgage foreclosure would be superfluous under our revenue laws. Any valid tax can be collected by the summary processes pointed out in the statute, and a claim of taxes not legally valid could not be enforced by a foreclosure in equity. It is a well-established rule that a remedy provided by statute for the enforcement or collection of taxes is exclusive, unless there is express statutory provision to supplement such remedy by action. Cooley, Tax'n, pp. 448, 449; 25 Am. & Eng. Enc. Law, p. 298, and cases cited in note 6.

One further point remains to be noticed. The answer states that the lands in question were sold for taxes by Kidder County, at the tax sale in 1895, for taxes levied thereon in the years 1889 and 1894, and that at such sale the state bid in the lands, and now holds them in trust for itself and Kidder county. The defendants, in their prayer for relief, have omitted to ask for a decree confirming and making absolute any estate, right, title, or lien which may have inured to the state on account of such alleged purchase of the lands at tax sale; and, in strictness, we think the defend-

ants are precluded from asking such relief by the very terms of their prayer for relief. By their prayer they expressly ask the Court to declare the very taxes for which said sale was made to be valid and subsisting taxes, and, using the language of the prayer, they ask that "each and every item of said taxes, and of the penalty and interest thereon, may be declared and decreed to be a good, valid, perpetual, and permanent lien and charge on the several parcels of land on which they were respectively levied." It would seem to be needless to say that, if these taxes are now valid taxes, as claimed, and are still existing liens on the lands, as claimed, the sale of the lands for the same taxes was invalid, and that no title or lien was created by the sale. A valid sale of land for taxes necessarily operates to extinguish the taxes, and, unless a sale does so operate, it is ineffectual for any purpose, and no rights can be based upon it.

But we further hold that, if the lands were purchased by the state at the tax sale held in 1895, the state could not, by such purchase, acquire a fee-simple title, or any absolute estate in the lands, for the reason that the owner of such lands could redeem them from such sale at any time after the forfeiture. See section 86 of chapter 132 of the Laws of 1890. But a more recent statute, and one which we regard as being expressly applicable to the case under consideration, was enacted in 1897, and is now embraced in chapter 67 of the Session Laws of that year. It is entitled "An act to enforce the payment of taxes which became delinquent in and prior to the year 1895." Among the delinquent taxes referred to expressly in this statute, and for the collection of which an action may be brought under this statute, are those taxes for which lands have been sold at tax sales and bid off by the state or county. The statute requires the county treasurer to prepare a delinquent tax list, and, among other provisions, it declares that "such list shall include such taxes upon any real estate which may at any tax sale have been struck off to or declred to be forfeited to the state or county, whether such sale or forfeiture was valid or invalid." Laws 1897, c. 67, § 1. By these provisions the legislature has seen fit, in effect, to voluntarily surrender all title, right, or lien which the state had theretofore acquired under tax sales of land bid off for the state or county, whether such sales were valid or invalid, and in lieu of the rights acquired by such sales the state has accepted the tax itself, upon which the sales were made, as it existed prior to such sales. This the state had an undoubted right to do, and this it has done; and the courts as well as the public corporations interested in such taxes and tax sales, are bound to observe the mandate of the supreme authority thus clearly expressed. The legislature, by this statute, has chosen, for reasons satisfactory to itself, to relegate the counties to the peculiar remedy which the statute of 1897 provides. Under this statute the counties are permitted to institute an action against all the lands of the plaintiffs bid in by the state, and in such action

can collect the taxes of 1889, 1892, and 1894. The taxes of 1895 and 1896 may be collected by the summary processes which the statute has provided for the purpose of collecting such taxes.

Our conclusion is that the judgment of the trial court was right, and the defendants, under the law and practice of the courts, are not entitled to the equitable relief demanded in the answer. The judgment must be affirmed. All the judges concurring.

(79 N. W. Rep. 875.)

A. E. CLENDENING *vs.* M. E. HAWK.

Opinion filed May 27, 1899.

Tenant's Interest in Crops—Construction of Lease.

The title and interest of a tenant in grain produced by him upon land cultivated under a written lease from the owner of the land, which has not been abrogated or suspended, is to be determined by the terms of such lease.

Acts of Unauthorized Agent.

When such tenant, during the life of the lease, enters into a written contract with a third person, who assumes to act therein as agent for the owner, but is not so in fact, whereby the tenant is to receive a fixed compensation in money, instead of a share of the crop, such contract, not being authorized or ratified by the landlord, does not alter or supersede the original lease.

Right of Action in Conversion.

To entitle one to maintain an action for the conversion of personal property, he must show that at the time of the alleged conversion he had possession, or a legal right to the immediate possession, and a general or special ownership in the property converted. Parker v. Bank, 3 N. D. 87, 54 N. W. Rep. 313, followed.

Second Mortgagee's Measure of Damage.

A second mortgagee may maintain an action against a first mortgagee for the conversion by the latter of personal property included in both mortgages. The measure of recovery in such case is the value of the property converted (not exceeding the amount due upon plaintiff's lien), less the amount due upon the first mortgage. Lovejoy v. Bank, 5 N. D. 623, 67 N. W. Rep. 956, followed.

Action by Second Against First Mortgagee.

In an action by a second mortgagee against a first mortgagee for the conversion by the latter of property covered by both mortgages, where it appeared that the value of the property converted exceeded the amount due upon the first mortgage lien, *held*, it was error to direct a verdict for the defendant

Appeal from District Court, Cass County; *Pollock*, J.

Action by A. E. Clendening against M. E. Hawk. Judgment for defendant, and plaintiff appeals.

Reversed.

Benton, Lovell & Bradley, for appellant.

The Court erred in directing a verdict for defendant. It is only where there is no legal evidence which if believed will establish a fact material to the plaintiff's case that the Court can direct a verdict. *Carver* v. *Plank Road Co.,* 61 Mich. 584. Where evidence is conflicting, or the credibility of witnesses is questioned the case is for the jury. *Houch* v. *Gue,* 46 N. W. Rep. 280; *United States* v. *Tillotson,* 12 Wheat. 181; *Russell* v. *Smith,* 23 S. E. Rep. 5; *Dirimple* v. *Bank,* 65 N. W. Rep. 501; *Chicago, etc. R. Co.* v. *Olney,* 71 Fed. Rep. 95; *Easley* v. *Easley,* 18 B. Mon. 86. If different minds may honestly draw different conclusions from the facts, whether disputed or not, the case should be left to the jury. *Stevens* v. *Pendleton,* 85 Mich. 137, 83 Mich. 342; *Knight* v. *Towles,* 62 N. W. Rep. 964; *Milne* v. *Walker,* 59 Ia. 186; *Smith* v. *Coe,* 55 N. Y. 678; *Overton* v. *Mining Co.,* 131 Ind. 135; *Sinter* v. *Park Nat. Bank,* 53 N. W. Rep. 205. Hawk's pretended lease to himself was unlawful as against public policy. Mechem on Agency, 457-458; Taylor's L'd. & Ten. § 142; *Cundy* v. *Lindsay,* L. R. 3 App. Cas. 465; *Randolph* v. *Elliot,* 34 N. J. L. 184; *Gregory* v. *Wendell,* 40 Mich. 443; *Barnes* v. *Shoemaker,* 112 Ind. 512; *Winchester* v. *Howard,* 97 Mass. 303.

Tilly & McLeod, for respondent.

The later and better rule as to the direction of verdicts is that a case should not be left to a jury unless there is evidence which will warrant a verdict in favor of the party producing it. Or that if a different verdict was rendered it would be set aside as contrary to the evidence. 2 Thompson Trials, 2247-2248; *Farmers' Bank* v. *Duvall,* 7 Gill. & J. (Md.) 78; *Davis* v. *Davis,* 7 Har. & J. (Md.) 36; *Cole* v. *Helb,* 7 Gill. & J. (Md.) 41; *Giermaun* v. *Ry Co.,* 42 Minn. 5; *Rich* v. *Rich,* 16 Wend. 663; *Goodrich* v. *Walker,* 1 Johns. Cas. 251; *Rudd* v. *Davis,* 3 Hill 287, 7 Hill 529; *McDonald* v. *Walter,* 40 N. Y. 551; *Dwight* v. *Ins. Co.,* 103 N. Y. 341; *Didge* v. *Gaylord,* 53 Ind. 365; *Peet* v. *Ins. Co.,* 1 S. D. 262; *Matthis* v. *Matthis,* 3 Jones (N. C.) 132; *Sutton* v. *Madre,* 2 Jones (N. C.) 320; *State* v. *Vinson,* 63 N. C. 355; *Holland* v. *Kindregan,* 155 Pa. St. 156; *Patterson* v. *Dushane,* 115 Pa. St. 334; *Howard Exp. Co.* v. *Nile,* 64 Pa. St. 201; *Bagley* v. *Bowe,* 105 N. Y. 171; *Boulger* v. *Rosa,* 119 N. Y. 459; *Jones* v. *Ry. Co.,* 49 Wis. 352; *O'Brien* v. *Ry. Co.,* 66 N. W. Rep. 363; *Larson* v. *Eau Claire,* 65 N. W. Rep. 731.

YOUNG, J. One question only is presented by defendant's appeal in this case, and that relates to the correctness of the order of the trial court in granting plaintiff's motion for a directed verdict at the close of the case. The plaintiff seeks to recover the value of a quantity of grain which he alleges was converted by the defendant on September 15, 1896. The grounds upon which the right of recovery is based are set out at length in the complaint, in two

distinct causes of action. The first alleges his ownership of the grain in question. The second sets up the lien of a chattel mortgage executed by one J. M. Keep, and default therein entitling him to possession. The answer meets the allegations of ownership contained in the first cause of action by an explicit denial, and as to the second cause of action, based upon the chattel mortgage, alleges that Keep, the mortgagor, had no right or interest in this grain which he could mortgage. So far as the facts contained in the record are material to a review of the single question presented here, they are these:

For several years just prior to 1896, the year in which this grain was grown, J. M. Keep had been a tenant of the Maryland Land Company, farming for it upon shares certain lands owned by it in Cass county. Under the terms of his several leases with them, which were made yearly, he retained three-fourths of the grain, and delivered the remaining fourth at the elevator at Buffalo to his lessor. During this time one W. J. Hawk, the husband of defendant, appears to have attended to receiving the grain at Buffalo for the lessor, and also to have attended to certain matters connected with the actual leasing, but to what extent is not clear; neither is it material in this case, for it is shown that the lease under which the grain in controversy was grown was made under the express direction of the lessor. On December 6, 1895, Keep leased the land for the year 1896, by a written lease of that date, identical in terms with that of the preceding years. This lease was duly authorized by the owner of the land, and is the only lease it either authorized or ratified. It does not admit of dispute that Keep acted under this lease up to the time that he had about 100 acres of wheat seeded. Here, however, begins a series of transactions among the creditors of Keep which have supplied the material for this litigation. It appears that Keep was indebted to A. E. Clendening & Co., of which firm plaintiff was a member, upon a promissory note for $275, which was secured by a chattel mortgage upon the crop of 1896 and upon other property; also to the defendant in a large sum, also secured upon this grain and additional property, defendant's security being prior to that held by Clendening & Co. At and after this time Keep entered into separate contracts, and at different times, with plaintiff, who had become the owner of the note of Clendening & Co., and with defendant's husband, whereby, through them, he secured such advances of money, provision, and credit as was necessary for him to produce this crop, and without which it is evident he could not have done so. By these separate arrangements both Clendening and defendant's husband sought, not only to secure themselves for the advances made, but also to further secure Keep's original indebtedness, by obtaining his entire interest in the crops raised for this year. On May 14, 1896, Keep entered into a written contract with defendant's husband, by which he agreed to cultivate the lands in question for that year for the first party named

in the contract, who was denominated therein as "W. J. Hawk, Agent," and to pay all expenses, and to deliver all the grain at the elevator at Buffalo in the name of the first party. This contract was signed, W. J. Hawk, Agent First Party," and "J. M. Keep, Second Party." For such services the first party was to pay to Keep the sum of $4 per acre.

There seems to have been an oral understanding that out of that sum there should be retained the amount of Hawk's advances, as well as defendant's claim. Keep testifies that his cash contract contained certain conditions in reference to plowing which were to be changed before it was to go into effect, that they were not changed, and that he did not give up his original lease, but continued to act thereunder. With this, however, we are not concerned; for this contract is shown to be wholly between Keep and the defendant's husband, and it did not, therefore, abrogate or supersede the lease made by the owners of the land on December 6, 1895, which stands without contradiction in the record as the only lease or contract either authorized or ratified by them for this year, or of which they had any knowledge. It appears that Keep, as well as the plaintiff, when he examined the cash contract, considered it as the contract of the Maryland Land Company. That it was not is clear. This is shown by the testimony of John R. Bond and Samuel A. Reynolds, who had the immediate charge of this land for the owner. Both testified that the lease of December 6, 1895, was the only contract they had for the year 1896; that defendant's husband had no authority to make the later contract. Even Mr. Hawk does not claim that this cash contract, signed by him, "W. J. Hawk, Agent," in any way bound the owners of the land, or that it was a new contract, superseding the lease. On the contrary, he testifies: "I intended to work the land myself. The Maryland Land Company never gave me authority to hire anybody to work the land by the acre for them. No member of the company or owner of the land ever gave me a lease of the land. I had no lease individually for this land, or any permission to work the land myself, except as I received authority from myself as agent for them. I never had any lease or contract, except from myself as agent." This is clearly a contract between Keep and defendant's husband. Whether it was consummated, and what its legal effect as between the parties thereto, it is not necessary for us to discuss; for it is plain that, under any construction, it could not alter or supersede the lease of December 6, 1895, made by the owners of the land. The ownership of the grain in question is to be determined by the contract in force at the time it came into existence. That, as we have seen, is the original lease, which, as between the parties, has not been in any way affected by the subsequent arrangements of those who were not the immediate parties thereto. Under the terms of this lease three-fourths of the grain grown came into existence as the property of Keep, impressed with the lien of such chattel mortgages as he had given; the sur-

plus above the amount required to discharge such liens continuing subject to his right of disposal as owner as he saw fit. On September 10, 1896, Clendening, believing that the cash contract had been authorized by the Maryland Land Company, and that it was its contract, secured a written assignment thereof from Keep, for the purpose of securing the amount then due him, and for advancements which he thereafter made on the strength of holding the assignment. After the crop was threshed and delivered to defendant's elevator in Buffalo, plaintiff made demand upon the Maryland Land Company for payment of the cash sum due Keep for producing the grain under this contract. It then developed that this contract was not only unauthorized by it, but its existence was unknown; further, that defendant's husband had remitted to it the proceeds of its one-fourth of the grain, in accordance with the terms of the original lease, as he had done in previous years. Plaintiff's demand was, of course, refused. Thereafter on January 9, 1897, he obtained from Keep an assignment of all his right and interest in the crop of 1896, including his rights under the original lease.

These statements of facts are sufficient for our present purpose. It will be seen that plaintiff wholly failed to present any evidence to support the allegation of ownership contained in his first cause of action. The assignment of the cash contract—if it were in force, and had been properly authorized—would transfer to him only a right to recover the amount of money due his assignor; and the assignment of the lease was made long after the date of the alleged conversion. Ownership at the time was necessary. This Court, in *Parker* v. *Bank,* 3 N. D. 87, 54 N. W. Rep. 313, said: "It is well settled that no action for conversion can be maintained unless the plaintiff shows a general or special ownership in the property converted, and possession or a legal right to immediate possession at the time of the conversion." As to this cause of action the order of the trial court was correct.

The second cause of action, wherein plaintiff relied upon his chattel mortgage lien, was, we find, improperly withdrawn from the consideration of the jury. The existence of the debt, the mortgage, the identity of the property, and default entitling plaintiff to possession were properly shown. It is true that plaintiff's mortgage is not a first lien, and that the defendant had two prior mortgages on this grain; but it is settled law within this jurisdiction that a second mortgagee may maintain an action for conversion against the first mortgagee for the wrongful conversion of the property covered by the two mortgages, and recover as damages the value of the property converted, up to the amount due on his lien, less the amount due upon the prior liens held by the first mortgagee. *Lovejoy* v. *Bank,* 5 N. D. 623, 67 N. W. Rep. 956. If, in this case, it appeared that the amount of defendant's mortgage liens exceeded the value of the property, then plaintiff would have suffered no damage, and direction of a verdict against him would

have been proper; but, on the contrary, it appears that the value of the grain received by the defendant was largely in excess of the amount of the debt secured by her chattel mortgages. The verdict was, therefore, as to this cause of action, improperly directed.

Defendant's answer contains no allegation under which evidence of the existence of prior incumbrances is admissable in mitigation of damages. This evidence was received at the trial over plaintiff's objection, but upon the Court's order, which appears of record, permitting defendant to amend her answer to conform to the proof. This has not been done, and the case is here upon the original pleading. Should we treat it as amended, however, it would not alter our conclusion. The judgment of the District Court is reversed, and a new trial ordered. All concur.

(79 N. W. Rep. 878.)

MARTIN P. GJERSTADENGEN *vs.* W. J. HARTZELL.

Opinion filed June 2, 1899.

Pleading—Sham Answer.

The statutory right to deny allegations in a pleading by denying knowledge or information thereof sufficient to form a belief is not an absolute right. Accordingly *held*, upon the facts stated in the opinion, that the denial, in such form, contained in the answer, was properly stricken out as sham.

Absolute Denial Cannot be Stricken Out as Sham.

An absolute denial in an answer of a material allegation in the complaint cannot be stricken out as sham on motion based upon affidavits tending to establish the truth of the matter denied.

Demurrer When Proper.

The proper method of testing the legal sufficiency of affirmative defenses contained in an answer is by demurrer, and not by motion to strike out. *Held*, that a motion to strike out certain affirmative defenses contained in the answer, upon the ground that they "do not state sufficient facts to constitute a defense or counterclaim," should have been denied.

Appeal from District Court, Ransom County; *Lauder*, J.

Action by Martin Peterson Gjerstadengen, Peter Peterson Sandvig, and Charles O. Peterson against William J. Hartzell for the partition of a quarter section of land in Ransom county, or for a sale of the property and division of the proceeds. The plaintiff moved to strike out certain portions of the defendant's answer as sham. Motion granted, and defendant appealed from the order striking out portions of his answer.

J. E. Bishop (*Pierce & Austin*, of counsel), for appellant.

The action of Gjerstadengen against Van Duzen & Co. was pending until its final determination on appeal on the second day of June, 1898. Sec. 5739, Rev. Codes; *Alrich* v. *Case*, 73 N. W.

Rep. 161; *Martin* v. *Gilmore,* 72 Ill. 200; *Hills* v. *Sherwood,* 33 Cal. 478; *Brown* v. *Evans,* 18 Fed. Rep. 59. No lis pendens was filed. Defendant had no constructive notice of the pendency of the action against Van Duzen & Co. § 5251, Rev. Codes; *Heard* v. *Fordyce,* 17 Cal. 152; *Mills* v. *Bliss,* 55 N. Y. 141; *Richardson* v. *White,* 18 Cal. 103; *Jewell* v. *Land Co.,* 64 Minn. 540; *Conkey* v. *Dyke,* 17 Minn. 457. Defendant had no actual notice of the pendency of the action or of the decree, and is not bound thereby. The decree in the Van Duzen & Co. case was not recorded in the register of deeds office prior to the conveyance to defendant, as it should have been to convey constructive notice. §§ 3563, 3594-3595, Rev. Codes; Story's Eq. Jur., § 404; *Farmers' L. & T. Co.* v. *Maltby,* 8 Paige, 361; *Mesick* v. *Sunderland,* 6 Cal. 316; *Rower* v. *Bingham,* 17 Ind. 542. The amount paid by defendant as taxes against the common property, as well as for improvements should be considered in the partition, and the averments in the answer covering them should not have been stricken out. Ch. 1, § 93, Laws 1897; 11 Am. & Eng. Enc. L. 1109; *Oliver* v. *Montgomery,* 39 Ia. 601; *Kite* v. *Church,* 142 Mass. 586; *Dean* v. *O'Mera,* 47 Ill. 120; *Kurtz* v. *Hibner,* 55 Ill. 514; *Robinson* v. *McDonald,* 11 Tex. 390; *Sarbach* v. *Newell,* 30 Kan. 102; *Allen* v. *Hall,* 50 Me. 265; *Titsworth* v. *Stout,* 49 Ill. 78; *Alleman* v. *Hawley,* 117 Ind. 532; Note "c" to *Ward* v. *Ward,* 29 L. R. A. 482; *Oliver* v. *Montgomery,* 42 Ia. 36; *Green* v. *Putnam,* 1 Barb. 507. Paragraph nine of the answer alleging ownership and possession in defendant was improperly stricken out. § 5802, Rev. Codes; *Bonham* v. *Weymouth,* 39 Minn. 92; *Bollo* v. *Navarro,* 33 Cal. 467; Freeman on Cotenancy (2d Ed.) § 502-503; 17 Am. & Eng. Enc. L. 712.

Morrill & Engerud, for respondents.

Lis pendens terminates upon the entry of judgment. *Scudder* v. *Sargent,* 17 N. W. Rep. 369; *Parker* v. *Courtney,* 44 N. W. Rep. 863; *Monell* v. *Lawrence,* 12 Johns. 334; *Grattan* v. *Wiggins,* 23 Cal. 16, 38; *Sheridan* v. *Andrews,* 49 N. Y. 478; Black on Judgments, § 552. In consequence of this rule a purchaser was held not to be affected by a reversal on appeal. To correct this injustice the legislature adopted the rule of Sec. 5739, Rev. Codes. This statute, however does not suspend the operation of the judgment for all purposes pending appeal. §§ 5610-5616, and § 5412, Rev. Codes. The doctrine of lis pendens is based on necessity. *Bellamy* v. *Sabine,* 1 De Gex & Jones, 566; *Houston* v. *Timmerman,* 4 L. R. A. 716. Under the old system the effect of lis pendens terminated with the entry of the decree. Purchasers after entry of decree were not lis pendens purchasers but were bound by the decree by the doctrine of estoppel. *Page* v. *Waring,* 76 N. Y. 463; *Sheridan* v. *Andrews,* 49 N. Y. 478. The grantee of the person against whom the decree affecting property was rendered is a privy in estate with his grantor. *Stranger* v. *Johnson,* 110 Pa. 21; *Tell* v. *Bennett,* 110 Pa. 181; *Goddard* v. *Benson,* 15 Abb. Pr. 191;

Herman on Estoppel, § 139-143-144, and a privy in estate cannot acquire by his purchase greater rights than his grantor had to sell. Herman on Estoppel, § 143-144; *Cushing* v. *Edwards*, 25 N. W. Rep. 940; *Morrill* v. *Morrill*, 11 L. R. A. 155 and n.; *Howard* v. *Huron*, 5 S. D. 539; *Eakin* v. *McCraith*, 3 Pac. Rep. 838. The statute modifies the old rule so that a purchaser pendente lite is not bound by the decree subsequently rendered in the action unless he has notice actual or constructive of the pendency of the action. *Sheridan* v. *Andrews*, 49 N. Y. 478. A judgment is not a conveyance within the meaning of the recording act. § 3594 and 3595, Rev. Codes; *Hoag* v. *Howard*, 55 Cal. 564. Those parts of defendant's answer in which he sets forth by way of counterclaim matters which had been or could have been litigated in the Van Duzen case, were properly stricken out. The Van Duzen judgment estops not only as to the issues actually determined thereby, but also as to all matters which could have been litigated in the action in which it was rendered. *Enderlin Bank* v. *Jennings*, 4 N. D. 228; *Howard* v. *Huron*, 5 S. D. 539; *Eakin* v. *McCraith*, 3 Pac. Rep. 838; *Morrill* v. *Morrill*, 11 L. R. A. 155 and n.; 1 Herman on Estoppel, 51-74-127. The answer shows on its face that the improvements were not made at the request or with the assent of the other co-tenants, therefore the co-tenants excluded from possession cannot be compelled to contribute to the improvements. *Ward* v. *Ward*, 29 L. R. A. 449, n. a.; *Gage* v. *Gage*, 28 L. R. A. 829 and n.; *Cosgriff* v. *Foss*, 36 L. R. A. 753.

YOUNG, J. This action has for its purpose the partitioning of a certain tract of real estate situated in Ransom county, the title to which was directly involved in a former adjudication of the District Court of that county in a case entitled *Gjerstadengen* v. *Van Duzen*; the judgment of that court having been affirmed by this Court upon appeal, and reported in 7 N. D. 612, 76 N. W. Rep. 233. Five of the plaintiffs in the former action appear to have since conveyed their interests in the land in question, by deeds, to one of the plaintiffs in the present action. The plaintiffs in this action claim to own 26-27 of the land, and that the defendant owns only the remaining 1-27. The defendant, Hartzell, is the grantee of G. W. Van Duzen & Co., the defendant in the former action; having obtained title through a warranty deed executed and delivered subsequent to the rendition and entry of the judgment of the District Court against his grantor, but before the affirmance of that judgment by this Court. This defendant makes claim in his answer of title to the entire tract, alleging that he had no notice of the pendency of the former action, or of the rendition or entry of judgment, at the time of his purchase, wherein the interest of his immediate grantor was determined to be but 1-27. The questions now presented for our review are altogether preliminary to the real issues, and do not require a more extended statement of facts. This appeal is from an order striking out portions of defendant's answer. Plaintiffs' motion to strike was leveled at different parts

of the answer, and upon different grounds. The Court granted the motion in its entirety, and made an order striking out all of the parts assailed by it.

We will first consider certain portions which were stricken out as sham. Plaintiffs, after alleging ownership in fee simple of the land in themselves, further alleged that on the 23d day of August, 1897, a judgment was rendered and entered in the District Court of Ransom county in the action wherein the defendant's grantor was defendant, decreeing, among other things, that the plaintiffs in said action were the true and lawful owners of 26-27 of said land. The part of defendant's answer to this allegation which the motion characterizes as sham, and which the trial court found to be so,—with which conclusion we fully agree,—is in this language: "Defendant has not sufficient knowledge or information to form a belief as to the truth or falsity of the allegation in plaintiffs' complaint that on the 23d day of August, 1897, the certain judgment therein described was rendered, and therefore denies such judgment was rendered or entered as alleged, or at all, and leaves these plaintiffs to make such proof of said allegation as they may be advised." A sham answer or defense is one which is good in form, but false in fact (Bliss, Code Pl. § 422), and may be stricken out upon motion (Rev. Codes, § 5276). It is true, section 5273, Rev. Codes, permits a defendant to answer in the form in which this answer is couched; but, in alleging absence of knowledge or information sufficient to form a belief, the defendant is held to as strict an adherence to the truth as though the denial were explicit. This principle is expressed in Bliss on Code Pleading (section 326) as follows: "The obligation to verify the pleading implies an obligation to state the truth. Hence the permission to deny any knowledge or information, etc., is not absolute. If the fact charged is evidently within the defendant's knowledge,—as an act done by himself, and within the period of recollection, or where he has the means of information,—a denial of information in the language of the statute would be clearly false or evasive, and such answer should be disregarded." Here the complaint pointed out the time when and the place where the judgment was entered in the public records. This Court, in *Van Dyke* v. *Doherty*, 6 N. D. 263, 69 N. W. Rep. 200, entirely disregarded an answer which, like that now under consideration, denied certain facts which were evidenced by the public records, using this language: "The public records of the county furnished the evidence that would demonstrate to a certainty whether plaintiff had or had not paid the taxes. With this means of positive information before him, a party is not permitted to say that he has no knowledge or information sufficient to form a belief. While the statute authorizes a denial in that form, yet it requires good faith and honesty of purpose; and it cannot be tolerated that a party may shut his eyes to information thrust before them, in order to be technically able to say that he has no such information. * * * Such a denial must

be disregarded." See, also, *Wheaton* v. *Briggs*, 35 Minn. 470, 29 N. W. Rep. 170; *Mulcahy* v. *Buckley*, 100 Cal. 484, 35 Pac. Rep. 144; 1 Enc. Pl. & Prac. 813, and citations. We may also add that the record before the Court disclosed that the attorneys who now interpose this answer, denying the rendition and entry of the judgment in the former case upon information and belief, were the attorneys for the defendant in that litigation. A defendant is not permitted to resort to such a denial, when all he has to do to learn the true facts is to ask his attorney. *Hance* v. *Rumming*, 2 E. D. Smith, 48; *Mott* v. *Burnett*, Id. 50; *Wesson* v. *Judd*, 1 Abb. Prac. 254. The falsity of this portion of the answer was apparent from a bare inspection of the pleadings, and without the aid of extrinsic proof. It was clearly a sham defense, and was properly stricken out.

The striking out of the paragraph which we will next consider raises an entirely different question. The part stricken out contained a denial of the execution and delivery of certain deeds, and the transfer of the title thereby, made by five of the former owners of separate interests in the real estate to one of the plaintiffs, which facts are alleged in the complaint as showing the source and extent of plaintiff's title. Plaintiffs treat the form of the denial as good, but, as in the other instance, attack it as false and sham, and, for the purpose of showing the falsity of the denial, produced with their motion papers the affidavit of Charles O. Peterson, one of the plaintiffs herein, who is the person to whom the several deeds were given, setting out that he purchased the property as alleged in the complaint, and exhibiting with it the original deeds by which the title was conveyed. No counter affidavits were filed. If the question before us simply related to the truth or falsity of this portion of the answer, it is readily seen that our conclusion would be in accord with that of the trial court,—that the answer was false, and was properly stricken out as sham. But the real question is one of procedure, and involves at the threshold the right of a court to entertain and consider affidavits offered to show that a general denial which merely places the material allegations of the complaint in issue is false, and thereby lay the foundation for striking it out as sham. There is considerable diversity of opinion in the cases upon this point. But as early as 1886 it was settled in this jurisdiction by the territorial Supreme Court, in the case of *Woodenware Co.* v. *Jaensen*, 4 Dak. 149, 27 N. W. Rep. 206, and 28 N. W. Rep. 193, that a verified answer, consisting of a general denial, could not be stricken out as sham upon affidavit showing it to be false, since which time the practice so established has been recognized by the courts of this jurisdiction, and generally acquiesced in by the legal profession. The courts of New York have adhered to the same rule of practice. *Wayland* v. *Tysen*, 45 N. Y. 281; *Thompson* v. *Railway Co.*, Id. 468; *Bank* v. *Smith*, 15 How. Prac. 329; *Claflin* v. *Jaroslauski*, 64 Barb. 463. See, also, *Brown* v. *Lewis*, 10 Ind. 232. In *Wayland* v. *Tysen*, supra, the Court said: "The Code, it is true, allows the defendant to deny any

knowledge or information sufficient to form a belief, and thus put the fact in issue. If he verifies this, what right has the plaintiff to strike out his answer by producing affidavits showing the truth of such facts, of which defendant was ignorant at the time of filing his answer. Such affidavits fail entirely to show that the answer was put in in bad faith, or that it was false, and yet this is the very class of cases where the Court will be most frequently called upon to strike out the answer. If the defendant commits perjury in verifying the answer, as he must have done in this case, if he knew the allegations of the complaint were true, he ought to be prosecuted therefor. If plaintiffs who complain of injury from delay by the fraudulent interposition of false answers would perform the duty incumbent upon every good citizen,—to prosecute those known to be guilty of perjury,—they would effectually stop such an abuse." The paragraph now under consideration was good in form, and it created an issue upon a material allegation of the complaint. Neither the pleadings, nor public record, nor the doctrine of presumptive knowledge marked it as false. The issues of fact thus created by such a sworn denial should stand until determined in the regular way, and must not be prejudged upon affidavits. This portion should not have been stricken out.

The remaining portion to which reference is now made consist wholly of affirmative defenses set up entirely independent of the denials. The view which we are compelled to take of this part of the motion renders a statement of their substance unnecessary. It is sufficient to say that they were interposed as affirmative defenses, and that the plaintiffs had them stricken out upon the ground that they "do not state sufficient facts to constitute a defense or counterclaim," which is the exact language of the motion. It is very evident that the plaintiffs have mistaken the remedy for testing the legal sufficiency of such defenses. The Code of Civil Procedure fixes the scope of motions attacking pleadings. Under section 5284, a party who is aggrieved may have irrelevant or redundant matter stricken out, and require a pleading, when it is necessary, to be made more definite and certain. Section 5276 provides that sham and irrelevant answers may be stricken out, and section 5414 authorizes a party who is prejudiced by a frivolous demurrer, answer, or reply to move for judgment. But a specific method is also provided for testing the legal sufficiency of defenses, and that is the demurrer authorized by section 5277, which provides that "the plaintiff may in all cases demur to an answer containing new matter, when upon its face it does not constitute a defense, and the plaintiff may demur to one or more of such defenses and counterclaims and reply to the residue of the counterclaims." The plaintiffs have seen fit to make their attack by motion, but in so doing urge in support thereof none of the grounds properly belonging to the province of motions. The legal insufficiency of the defenses attacked is the sole question urged in the brief, and evidently was the only question presented to the lower court. That question not hav-

ing been properly before the court, we may not express an opinion here as to the defenses which are sought to be assailed by this motion, for a reasonable adherence to long established rules of practice requires us to hold that this question was not properly before the trial court. To permit the use of a motion for the purposes sought to be accomplished in this case is to extend to it the functions of a demurrer. This we cannot sanction. No other grounds than that mentioned were urged as reasons for striking out these affirmative defenses. This portion of the motion should therefore have been overruled. That portion of the order striking out the paragraph denying the entry of judgment we do not disturb. The other portions are reversed. The order so modified shall stand. Appellant will have his costs upon this appeal. All concur.

(79 N. W. Rep. 872.)

FIRST NATIONAL BANK OF FARGO *vs.* MINNEAPOLIS & NORTHERN ELEVATOR CO.

Opinion filed June 16, 1899.

Conversion—Damages—Highest Market Price.

Subdivision 2, § 5000, Rev. Codes, permits a recovery in conversion by the injured party of the highest market value of the property converted, at any time between the conversion and the verdict, where he has prosecuted his action with reasonable diligence. *Held*, as matter of law, under the facts of the case, which show an unexplained delay of 11 months in commencing its action, that plaintiff has not prosecuted its action with reasonable diligence, and cannot, therefore, recover the highest market price.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the First National Bank of Fargo against the Minneapolis & Northern Elevator Company. Judgment for plaintiff. Defendants appeals.

Reversed.

Ball, Watson & Maclay, for appellant.

The statute giving the highest market price between the date of the conversion and the verdict, Subd. 2, § 5000, Rev. Codes, does not apply under the facts proven. *Pickert* v. *Rugg*, 1 N. D. 230, 46 N. W. Rep. 446. The Court having directed a verdict, everything which the jury might reasonably infer from the evidence is to be considered as admitted. *Bank* v. *Smith*, 11 Wheat. 171; *Cameron* v. *Railway Co.*, 8 N. D. 124, 77 N. W. Rep. 1016; *McRae* v. *Bank*, 6 N. D. 353, 70 N. W. Rep. 813. The evidence received together with defendant's offer of proof establishes an ostensible agency in E. C. Eddy, under whose direction the purchase was made by defendant. *Quinn* v. *Dresbach*, 75 Cal. 159; *Reed* v. *Kellogg*, 67 N. W. Rep. 687; *Wilson* v. *Fones*, 68 N. W. Rep.

588; *Thompson* v. *Shelton,* 68 N. W. Rep. 1055; *Claflin* v. *Lenheim,* 66 N. Y. 301; *Columbia Co.* v. *Bank,* 53 N. W. Rep. 1061; *Tier* v. *Lampson,* 82 Am. Dec. 637, n.; Mechem, Agency, § 224; 1 Am. & Eng. Enc. L. (2d Ed.) 961-1220.

Newman, Spalding & Stambaugh, for respondent.

YOUNG, J. The only question for consideration upon this appeal relates to the proper measure of damages in actions for conversion. Plaintiff sues to recover the value of a quantity of wheat alleged to have been converted by the defendant, and upon which it had a mortgage. It is agreed that the quantity involved is 604 bushels, and there is no dispute as to its being covered by plaintiff's mortgage. At the trial, over defendant's objection, the plaintiff was permitted to prove the highest market price between the date of the alleged conversion and the trial. The defendant made an offer of evidence to show the market value at the date of the conversion. This was rejected by the court, and at the close of the case, upon plaintiff's motion, a verdict was directed in its favor for the highest market price, which was $1.42 per bushel. The appeal is from the order directing the verdict. Other errors are assigned, but inasmuch as we must hold that the measure of damages adopted by the trial court is erroneous, and is fatal to the order appealed from, and a new trial must be had, they will not be discussed.

The measure of plaintiff's recovery is fixed by section 5000, Rev. Codes, at "(1) the value of the property at the time of the conversion with interest from that time; or (2) when the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at the option of the injured party." It is at once apparent that plaintiff's right to the highest market price is entirely dependent upon the question whether or not it has prosecuted the action with such reasonable diligence as is contemplated in the foregoing statute. This section of the statute, which was formerly section 4603 of the Compiled Laws, was construed by the Court in *Pickert v. Rugg,* 1 N. D. 230, 46 N. W. Rep. 446, and applied to a state of facts almost identical with those in the case at bar. In that case, as in this, the facts as to the diligence used were undisputed, and the question of the measure of damages was therefore purely one of law. It was there held that the plaintiff, who had delayed commencing his action for 11 months after the conversion, had not exercised reasonable diligence, and could not, therefore, recover the highest market price. Here the alleged conversion occurred between August and November, 1896, and the action was begun August 18, 1897, there being approximately the same delay as in the Pickert case. The case was tried in May, 1898. No point is made, however, upon the fact that the case was not sooner brought to trial. The question of reasonable diligence is made to rest entirely upon the time the action was commenced. No reason is advanced, and we think none can be, why the ruling

in *Pickert* v. *Rugg*, supra, should not be followed. Our conclusion is, therefore, that the Court erred in permitting the plaintiff to recover the highest market price. The order of the District Court is reversed, and a new trial granted. All concur.
(79 N. W. Rep. 874.)

RED RIVER VALLEY NATIONAL BANK *vs.* O. G. BARNES, *et al.*

Opinion filed June 6, 1899.

Promissory Note—Consideration for Collateral Paper.

On February 28, 1895, R. was indebted to plaintiff in the sum of $9,000, and on that day gave his promissory note for that amount to plaintiff, payable September 28, 1895. On the same day, as collateral to said indebtedness, R. gave the plaintiff his promissory note for $2,000, falling due on September 1, 1895, and secured said $2,000 note by a chattel mortgage. The collateral paper had no independent consideration. *Held*, that the original indebtedness furnished a consideration for the collateral paper.

Extension of Time for Payment Sufficient Consideration.

Held, further, that extending the time of payment upon the original indebtedness was also a sufficient consideration for the collateral paper. Such transaction is considered as one transaction, and is construed as such.

Mortgage of Stock of Merchandise Without Change of Possession.

Where a chattel mortgage upon a stock of merchandise provided in terms that the mortgagor should remain in possession, and sell the mortgaged property at retail for cash only, and also required the mortgagor to keep accurate accounts of such sales, and turn over all the proceeds thereof to the creditor, to be applied by him upon the mortgage debt, *held*, that such mortgage is not fraudulent in law.

Oral Agreement for Salary to Mortgagor in Possession is Not per se Fraudulent.

Where, in such case, after the execution of the mortgage, the parties thereto entered into an oral agreement whereby the mortgagor, as a part of the expense incident to selling the goods at retail, is to retain a stipulated salary, not excessive in amount, as compensation for selling the goods at retail, *held*, that such oral agreement is to be construed with, and as a part of, the mortgage.

Mortgage Embodying Secret Trust.

So construing the same, *held*, further, that such mortgage is not fraudulent in law, as embodying a secret trust for the benefit of the debtor. In such cases the crucial question is whether the arrangement entered into is honestly made to secure the payment of an actual indebtedness, secured by the mortgage, or whether, on the contrary, it is a mere shift or device to shield the debtor's property from attack by other creditors, while it enables the debtor to proceed with his business for his own advantage.

Mortgage Sustained.

Under the facts in this case, *held*, that the arrangement was not fraudulent in fact.

Appeal from District Court, Cass County; *Pollock*, J.

Action by the Red River Valley National Bank against O. G. Barnes as sheriff of Cass county, N. D., and the North Star Boot & Shoe Company. Judgment for plaintiff. Defendants appeal.

Affirmed.

Newman, Spalding & Stambaugh, for appellant.

The collateral note was without consideration and void. *Turle* v. *Sargent*, 65 N. W. Rep. 349; *Wipperman* v. *Hardy*, 46 N. E. Rep. 537; *Vehon* v. *Vehon*, 70 Ill. App. 40; *Taylor* v. *Slater*, 12 Atl. Rep. 727. The principal note of $9,000 was given upon the consideration of an extension of a pre-existing debt. *Lundburg* v. *N. W. Elev. Co.*, 43 N. W. Rep. 685. The mortgage was purposely given for an amount largely in excess of the debt from Robinson to respondent, and is void in law. *Buttz* v. *Peacock*, 23 Wis. 359. If the transaction between respondent and Robinson was fraudulent, respondent should be held to a strict accounting for the property. *Collingsworth* v. *Bell*, 43 Pac. Rep. 252; *Mannen* v. *Bailey*, 32 Pac. Rep. 1085. The mortgage permitting the mortgagor to retain possession of property and sell and dispose of the same in the ordinary course of trade for cash, the mortgagor to account for the proceeds of sales, and the same to be applied to the payment of the debt secured does not render the mortgage void before maturity. *Lane* v. *Starr*, 1 S. D. 107, 45 N. W. Rep. 212. But the parole agreement permitting Robinson to continue the business, replenish the stock, and from the proceeds of sales pay for the same, and pay running expenses, retaining one hundred dollars per month for the support of his family, then to pay any balance upon the mortgage debt, rendered the mortgage void. So held where similar agreements are written in the mortgage. *Robison* v. *Elliott*, 22 Wall. 520; *Chophard* v. *Bayard*, 4 Minn. 418; *Griswold* v. *Sheldon*, 4 N. Y. 581 *Edgall* v. *Hart*, 9 N. Y. 213; *Barrett* v. *Fergus*, 99 Am. Dec. 547; *Stewart* v. *Duster*, 23 Wis. 136; *Collins* v. *Meyers*, 16 Ohio 447; *Freeman* v. *Rawson*, 5 Ohio St. 1; *Wilson* v. *Voigt*, 13 Pac. Rep. 726; *Leopold* v. *Silverman*, 16 N. W. Rep. 580; *Bannon* v. *Bawler*, 26 N. W. Rep. 236; *Sanford* v. *Jensen*, 69 N. W. Rep. 108; *Greely* v. *Winsor*, 1 S. D. 117; *First Nat. Bank* v. *Comfort*, 4 Dak. 167, 28 N. W. Rep. 855; *Robbins* v. *Parker*, 3 Metc. 117; *Shurtleff* v. *Willard*, 19 Pick. 202; *Anderson* v. *Patterson*, 25 N. W. Rep. 541; *Fisher* v. *Kelly*, 46 Pac. Rep. 146; *Little* v. *Burnham*, 49 Pac. Rep. 604; *Pierce* v. *Wagner*, 66 N. W. Rep. 977; *Birmingham Dry Goods Co.* v. *Kelso*, 18 So. Rep. 135; *Bank* v. *Goodbear*, 19 So. Rep. 204; *Mandeville* v. *Avery*, 124 N. Y. 376; *Pabst Brewing Co.* v. *Butchart*, 69 N. W. Rep. 809; *Wile* v. *Butler*, 34 Pac. Rep. 1110; *Black Hills Mer. Co.* v. *Gardner*, 58 N. W. Rep. 557; *Smith* v. *Ham*, 51 Mo. App. 433; *Rathbun* v. *Perry*, 31 Pac.

Rep. 679; *Deering & Co.* v. *Worthy,* 29 N. E. Rep. 55; *Huschle* v. *Morris,* 23 N. E. Rep. 643. Cases holding such a transaction valid proceed on the principle that title passes under the mortgage, and the mortgagee as owner can employ the mortgagor as his agent to conduct the business. *Blakeley* v. *Hummerel,* 64 N. W. Rep. 821; *Etherridge* v. *Sperry,* 139 U. S. 266; *Ephraim* v. *Kellaher,* 13 L. R. A. 604. The existence of the parole modification of the written agreement contained in the mortgage is equally fatal as if written in the mortgage. *Barnet v. Fergus,* 99 Am. Dec. 547; *Griswold* v. *Sheldon,* 4 N. Y. 581; *Adgell* v. *Hart,* 9 N. Y. 213; *Wood* v. *Lowry,* 17 Wend. 492; *Wilson* v. *Voigt,* 13 Pac. Rep. 726. The mortgages being fraudulent both in law and fact, the court will not be a party to it and assist in perpetrating a fraud, but will construe the transaction in favor of creditors and against the mortgagee. *Anderson* v. *Brenneman,* 6 N. W. Rep. 222. Plaintiff must account for the property taken at its value and no expenses of sale or foreclosure can be allowed. *Mandeville* v. *Avery,* 124 N. Y. 381; *Merry* v. *Wilcox,* 36 N. Y. Supp. 1050; *Miller* v. *McElvain,* 34 Pac. Rep. 396; *Blue Valley Bank* v. *Clement,* 26 N. W. Rep. 583; *Stormbey* v. *Lindberg,* 25 Minn. 515; Cobbey, Chat. Mtgs., 985, 1030.

Mills, Greene & Resser, for respondent.

The collateral note and mortgage represented a part of the transaction, adjusting Robinson's indebtedness to the plaintiff. The whole transaction must be construed together. § 3900, Rev. Codes. The chattel mortgage of merchandise is admitted to have been valid on its face. The subsequent parole agreement did not invalidate it. *Whitson* v. *Griffs,* 17 Pac. Rep. 801; *Ephraim* v. *Kelleher,* 18 L. R. A. 604, n.; *Frankhouser* v. *Ellett,* 22 Kan. 127; 31 Am. Rep. 171; *Etheridge* v. *Sperry,* 139 U. S. 171. There was no fraud in fact. The law then permitted preferences among creditors. § 4654 Comp. Laws; *Cutler* v. *Pollock,* 4 N. D. 205, 59 N. W. Rep. 1062.

WALLIN, J. This action was tried to the Court, and resulted in a judgment in favor of the plaintiff. The action was brought to recover damages for an alleged unlawful seizure and sale of personal property upon which the plaintiff had a chattel mortgage. The defendant O. G. Barnes seeks to justify as sheriff, and it is conceded that he made the seizure and sale of the property in his official capacity as sheriff of Cass county. The sheriff levied under an execution issued upon a judgment in favor of his co-defendant, the North Star Boot & Shoe Company, which judgment was entered in May, 1895. Said levy was made on or about September 18, 1895, and thereafter the goods were sold, and the proceeds of the sale were applied upon said execution. The controlling facts may be stated as follows:

On the 28th day of February, 1895, one E. M. Robinson was engaged in mercantile business, and then had a stock of merchan-

dise at Fargo, N. D. Said Robinson was also the owner of a large farm in Cass county, which he then was, and long had been, operating. On said 28th day of February Robinson was indebted to the plaintiff in the sum of $9,000, and no more, which indebtedness had then been for some time accumulating. On said date Robinson executed and delivered to the plaintiff his promissory note for $9,000, falling due on September 28, 1895. On said date Robinson also executed and delivered to plaintiff his certain other promissory note, for the sum of $2,000, falling due September 1, 1895. To secure said $2,000 note said Robinson and his wife executed and delivered to plaintiff their chattel mortgage upon all crops to be grown and raised on his said farm in the year 1895. Said mortgage also embraced certain personal property on said farm, consisting of farm machinery, implements, and domestic animals, which said farm machinery, implements, and domestic animals were the property seized and sold by the sheriff, and the same was the only property so seized or taken under said execution. In addition to the usual stipulation found in chattel mortgages, said mortgage contained the following agreement: "It is further agreed that, in case said mortgagee shall deem that the said crops are not properly sown, planted, cultivated, harvested, and threshed, or cared for, the said mortgagee has the right to enter on said land, and do all that is necessary to properly put in, harvest, thresh, and market said crops, and reimburse himself for all labor and expense out of the proceeds thereof; the portion remaining to be applied on the debt hereby secured." It is conceded that said $2,000 note and the mortgage was given and received as collateral, to secure said indebtedness evidenced by the $9,000 note, and that the collateral paper had no independent consideration.

It further appears that on April 15, 1895, said Robinson was indebted to plaintiff in the sum of $378.13 for advances made to him by the plaintiff subsequent to February 28, 1895, and said Robinson gave plaintiff his promissory note for said additional advances for $378.13, dated April 15, 1895, and falling due 90 days after its date. Said last-mentioned note, together with the said note for $9,000, evidenced an actual indebtedness then due from Robinson to the plaintiff in the sum of $9,378.13, exclusive of interest. To secure said total indebtedness, said Robinson executed and delivered to plaintiff another chattel mortgage, bearing date April 15, 1895. Said last-mentioned mortgage covered said stock of merchandise at Fargo, consisting of boots, shoes, trunks, etc., and also the fixtures and safe in said store. In addition to the usual conditions contained in chattel mortgages, said last-mentioned mortgage embraced the following stipulation: "It is further agreed that, so long as the terms and conditions of this mortgage are kept and performed, the undersigned may retain possession of said property, and sell and dispose of the same in the ordinary course of trade, for cash; but of all such sales the undersigned shall keep a detailed and accurate account, and at the end of each day shall render

to the said Red River Valley National Bank an accurate account of such sales, and shall, at the time of so rendering such accounts, pay over to said Red River Valley National Bank, its successors and assigns, the entire proceeds of all such sales, to be credited and applied, as fast as paid, to the payment of the debt hereby secured, until the same shall have been fully paid and satisfied." Both chattel mortgages were filed for record on April 16, 1895. On said last-mentioned date Robinson and the plaintiff entered into an oral agreement, substantially as follows: It was agreed (as a means of supporting said Robinson and his family, and as a means of defraying the expenses incident to carrying on said mercantile business) that said Robinson should retain out of the proceeds of sales made of the goods in said store the sum of $100 per month, and also retain sufficient of said proceeds of sales to defray the incidental expenses of operating said store business. It was further agreed that new goods were to be purchased out of such proceeds from time to time, in quantities to be determined by the plaintiff. Such new goods were, however, to be bought only in small quantities, for cash, and then only as a means of keeping an assortment, and to keep the stock in such condition as to make it profitable to handle, and with a view to the disposition of the entire stock of merchandise in the store.

It appears, further, that on said April 15, 1895, and to further secure said total indebtedness of $9,378.13, said Robinson and his wife executed and delivered to the plaintiff their certain mortgage upon said farm in Cass county, which mortgage was a second mortgage, and was junior to another mortgage of Robinson for $6,250. This junior mortgage was subsequently foreclosed, and the property bid in by plaintiff. On the same day (April 15th) Robinson and his wife executed and delivered their warranty deed of conveyance, whereby they conveyed their said farm to one John W. Von Nieda, who was then president of the plaintiff. Said warranty deed was, however, made as security for said total indebtedness due from Robinson to plaintiff, and it was agreed that said Von Nieda should dispose of said farm to the best advantage, and apply the proceeds thereof upon the indebtedness due the plaintiff from Robinson. It appears that accurate accounts were kept of the transactions occurring after April 15, 1895, between Robinson and the plaintiff. One of these accounts is known in this record as the "Farm Account," and the other as the "Store Account." The items embraced in these accounts are all in evidence. The evidence discloses that Robinson, in the spring of 1895, was financially unable to procure the seed grain necessary to seed his farm, or to defray the other expenses incident to carrying on the farm for that year. In this emergency the plaintiff, to protect its said security, intervened, and advanced considerable amounts, which were expended in buying seed grain, and paying wages and other expenses necessarily incurred in cropping and harvesting the crop of 1895, which sums are given in detail in said farm account.

Among the items in the farm account was one of $1,036.70, which is charged to Robinson, and represents a sum paid at his request by the plaintiff to liquidate the accumulated interest on the first mortgage upon the farm. The testimony shows that it was necessary to pay such interest, as well as certain taxes, in order to protect the securities which the plaintiff held at the time the interest was paid. The account also shows certain other items, which were paid by plaintiff at Robinson's request, to liquidate miscellaneous claims connected with the farm; and some of such claims, like the item of interest above mentioned, were not paid out in connection with raising or harvesting the crop of 1895, but all were paid at Robinson's request.

The evidence shows that, pursuant to the written and oral agreements made, as before stated, between Robinson and the plaintiff, the former continued to conduct said store business from April 16, 1895, until January 25, 1896, at which time the residue of the stock in the store was bid in by the plaintiff at the foreclosure sale made upon the mortgage given upon the store property. While the business was being conducted by Robinson, viz: from April 16th to January 25th, the sales were all made for cash, at retail, and an accurate account of all sales was kept by Robinson, and the same were promptly reported to the plaintiff, and all purchases were made from the proceeds of such sales, and were made only to replenish the stock, and for the purposes already stated. The entire proceeds of the sales made by Robinson, while he conducted the business under the written and oral stipulations above mentioned, after deducting therefrom the expenses incident to carrying on such business for a period of nine months, including his own salary of $100 a month, were credited by plaintiff on its said claim of $9,378.13. The net proceeds of the foreclosure of the chattel mortgage upon the goods were likewise credited upon such indebtedness, and the net proceeds of the foreclosure of the chattel mortgage upon the farm personalty not seized under the execution were also credited. The real estate mortgage was foreclosed, also, and bid in for a certain sum, which was placed to Robinson's credit upon the same indebtedness. It appears, also, that after the defendant Barnes had levied on said farm property, as already stated, and before he made the execution sale thereunder, the judgment creditor, the North Star Boot & Shoe Company, caused a notice to be served on the plaintiff, requiring, in effect, that the plaintiff should first exhaust all of its other securities before resorting to the property seized by the sheriff. The trial court finds, in effect, and the evidence fully justifies such finding, that, at the time the property in question was seized by the sheriff, there was due upon the indebtedness secured by said chattel mortgage upon the farm personalty a sum greatly in excess of the value of the property seized by the sheriff; and the Court also finds, upon sufficient evidence, the following facts: "That after the taking of said personal property by said defendants, and before the trial of this action, all other

securities held by the plaintiff for the debt of said E. M. Robinson to it, as heretofore set forth, had been fully exhausted by said plaintiff, and that at the time of the trial and final determination of this action in this court there remained owing by said E. M. Robinson to this plaintiff, upon said note and chattel mortgage hereinbefore described, an amount greatly in excess of the value of said personal property so taken by said defendants." The "note and chattel mortgage" referred to in the finding above quoted is the $2,000 note, secured by the chattel mortgage upon the farm personalty.

Upon this state of facts certain questions of law are presented for determination. As their first contention, it is urged by counsel for the defendants that said $2,000 note, and the chattel mortgage given to secure said note, are voidable, and should be held for naught, for the reason, as counsel claim, that the same are without consideration, and fraudulent as to creditors. If this proposition were sound, it would be decisive of the case; but we have no difficulty in reaching the conclusion that the note is based on a valid consideration, and that the mortgage was not fraudulent as to creditors. It is conceded that the note of $2,000, and mortgage to secure the same, were given and received as collateral paper to an indebtedness of $9,000 due from Robinson to the plaintiff. This debt was due, and had accumulated prior to February 28, 1895, upon which date the collateral paper was executed and delivered; and upon the same day, and as a part of one transaction, the principal debt was extended by a new note for $9,000, given by Robinson, and which, by its terms, matured on September 28, 1895. This extension, alone, was, in our judgment, a sufficient consideration. All the paper being executed at the same time, and with reference to the same indebtedness, brings the case within the familiar rule stated in section 3900, Rev. Codes, which provides that "several contracts relating to the same matter between the same parties, and made as parts of substantially one transaction, are to be construed together." In support of the contention that the collateral is without consideration, counsel cite *Turle* v. *Sargent* (Minn.) '65 N. W. Rep. 349; *Wipperman* v. *Hardy* (Ind. App.) 46 N. E. Rep. 537; *Vehon* v. *Vehon,* 10 Ill. App. 40; and *Taylor* v. *Slater* (R. I.) 12 Atl. Rep. 727. None of these citations are in point. True, they all announce the familiar rule that a note given without consideration is voidable; but this begs the question. The pertinent inquiry here is whether the collateral paper in question, in view of the conditions existing when it was given, and the purpose for which it was given, is without consideration. Upon the question of consideration we might safely rest this case upon the very cases cited by counsel, as all of them recognize an extension of time to the debtor as valid consideration for collateral paper, even when such paper is given by a stranger, resting under no legal or moral obligation to pay the principal debt. In the case of *Bank* v. *Lamont,* 5 N. D. 393, 67 N. W. Rep. 145, this Court found, as an inference from the

circumstances surrounding that case, that an extension of time was granted to the debtor, and upheld the collateral notes for that reason. The case at bar is much stronger on its facts, because in this case the $9,000 note itself furnishes irrefragable proof that an extension to the debtor was actually given from February 28th until September 28th. But we may go further, and say, upon authority, that the principal debt of $9,000 furnishes ample consideration for these collateral obligations. In *Spencer* v. *Ballou,* 18 N. Y. 327, the Court uses the following language: "A creditor may take as many notes from time to time as his debtor will give him for the same debt, and enforce either at his election. It makes no difference, as to the consideration, whether a note for a prior debt is given expressly as a collateral security, or is in terms or legal effect another principal security. The same consideration which will support a principal will support a collateral undertaking."

Counsel further contends that the $2,000 mortgage is fradulent, and hence void as to creditors. In support of this proposition counsel say in their brief that the mortgage, "being purposely given for an amount largely in excess of the debt from Robinson to respondent, is void in law." From our point of view, this statement of counsel as a statement of fact is singularly inaccurate, and is squarely opposed to the actual facts of the case, as already stated. Instead of being given for an amount largely in excess of the debt due plaintiff from Robinson, it was given for an amount which was less than one fourth of the actual debt then owing the plaintiff, and for which the plaintiff had a right to demand security of the debtor. Under such circumstances, the mortgage, when taken, cannot be characterized as a fraudulent cover of the debtor's property, upon grounds stated by counsel. Nor do we see any reason for holding the mortgage fraudulent as to creditors. It was a manifestation of laudable diligence on plaintiff's part to ask for and obtain security from Robinson, and in the regular course of its business as a bank the plaintiff obtained the mortgage we are here considering. There is not a scintilla of evidence in this record even tending to show that the security was asked for or given for any fraudulent purpose. At the time in question the statute declared that "a debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another." Comp. Laws, § 4654. Under this statute it must follow, in the entire absence of proof of an actual fraudulent intent, that the $2,000 mortgage which covered the property seized was a valid and subsisting lien upon the property when the sheriff seized the same, and this Court will so hold.

Nor are we able to reach any different conclusion with respect to the securities taken by plaintiff from Robinson on April 15, 1895. We have examined the record carefully, and, in the light of the conceded facts and the undisputed testimony, we have no difficulty in reaching the conclusion that the transactions of April 15, 1895, were honest business transactions between a debtor and a creditor,

and that the same were untainted by fraud as to creditors. The defendant the North Star Boot & Shoe Company was not a judgment creditor at that time, and, if it were such, the case would not have been different As has been seen, the statute then in force gave its express sanction to any lawful transaction whereby a debtor gave preference to one creditor by securing his claim in preference to another, left without security. The two mortgages executed by Robinson on April 15, 1895, were bona fide, and were given to secure the payment of an actual indebtedness of $9,378.13. True, the last-mentioned mortgages included all the debtor's property not already covered by the mortgage of February 28th. But this fact is not an indicium of fraud, nor does it tend to taint the transaction with suspicion. The security then taken was not excessive, and the sequel shows that the same was insufficient to pay the amount of the debt secured by the same. It does not appear that any creditor was prevented by the mortgages of April 15th from seizing any of Robinson's property. So far as appears, no creditor attempted to levy upon any property embraced within the mortgages of that date, or desired to levy thereon. But, if such mortgages had, as suggested by counsel, operated as a deterrent, and had actually prevented a seizure of such property by the defendants in satisfaction of their judgment, we are unable to discover in such a result anything unlawful or fraudulent. The plaintiff's prior lien, secured by its mortgages, would be superior in right and in law, and the same would be entitled to protection as such at the hands of the courts. Our conclusion is, upon this point, that the mortgages, when executed, were not, as contended by counsel, fraudulent either in law or in fact.

Nor did the stipulation, embraced in the mortgage, providing, in effect, that Robinson should remain in possession and sell the goods at retail, rendering an account of such sales, and turning over the proceeds to the plaintiff, operate to make the mortgage upon the store goods fraudulent as to creditors. This is conceded, and there is abundant authority to sustain the proposition. See *Conkling* v. *Shelley*, 28 N. Y. 360; *Brakett* v. *Harvey*, 91 N. Y. 215. These cases are cited with approval in *Lane* v. *Starr*, 1 S. D. 107, 45 N. W. Rep. 212. In the case of *Brackett* v. *Harvey*, 91 N. Y. 215, Judge Finch uses this language: "These cases went upon the ground that such sale and application of proceeds is the normal and proper purpose of a chattel mortgage, and within the precise boundaries of its lawful operation and effect. It does no more than to substitute the mortgagor as the agent of the mortgagee, to do exactly what the latter had the right to demand, what is was his privilege and his duty to accomplish. It devotes, as it should, the mortgaged property to the payment of the mortgage debt." Referring to a similar agreement, it was said, in *Conkling* v. *Shelley*, supra: "Such an agreement made the mortgagors agents of the mortgagees. Their possession and their sales were, in effect, those of the mortgagees. It was as if the latter had taken possession,

and placed a third person in charge as agent, to sell and account to them." The mortgage upon the merchandise embraced the usual stipulations to the effect that the mortgagee might take possession at any time he deemed said debt insecure, or if the debtor attemped to remove or dispose of the goods. But, as has been seen, these stipulations were modified by the express agreement, incorporated in the mortgage, whereby the mortgagor was clothed with authority to sell the goods at retail for cash, and turn over the proceeds of such sales to apply on plaintiff's claim. This express stipulation, under the authorities we have cited, created the relation of principal and agent between the debtor and the mortgagee, for the purpose of conducting the sales of the property hypothecated as security. Nor does it, in our judgment, make any difference that the legal title of the chattels in the store was vested in Robinson. He had given the plaintiff a specific lien upon the goods, of such a character as to prevent his disposing of the same without the plaintiff's consent. This consent was given, with certain limitations, expressed in the mortgage. Under the agreements, the debtor was empowered to sell, but only as the agent of the mortgagee. But, as has been shown, the mortgage provided, in express terms, that all proceeds of sales of the goods in the store were to be turned over to the plaintiff and credited upon the debt secured by the mortgage. It appears, further, by the record, that this feature of the instrument was modified by an oral arrangement made between the plaintiff and Robinson, and under which all sales at retail were made. This arrangement, in brief, required Robinson to turn over the proceeds of sales, after deducting therefrom the expenses incident to carrying on the store business, including a salary agreed to be paid Robinson of $100 per month, and amounting to $900 for the period during which the business was so conducted.

Counsel contend that the oral agreement must be given the same effect that would be attached to it if it were written in the instrument. In this we fully agree with counsel. But the further contention is made that the mortgage, so modified, is fraudulent as to creditors, because, as counsel argue, the debtor is allowed, under the modified arrangement, to carry on the business for his own benefit, in this: that the debtor received a salary for selling out the merchandise at retail. No other item of the total expense of selling the goods seems to be criticised by counsel. But counsel seem to attach great importance to this one item of necessary expenditure, not because the salary was not earned, nor because Robinson did not conduct the business of his agency with diligence, honesty, and good judgment. No such charges are made, and none such could be sustained upon the evidence. But counsel urge that the mortgage arrangement, as modified, in its practical workings operated to the advantage of the debtor, by giving him a position at a salary sufficient to support his family, and, as counsel argue, to carry on the business substantially as he did before the mortgage was made. There is much conflict of judicial opinion as to the

effect of permitting a debtor, who has given a mortgage upon a stock of merchandise, to remain in possession and sell out the same. But we think it must be conceded that the better authorities do not hold that such an arrangement is necessarily fraudulent. Each case should be disposed of upon its own facts. We concede, however, that there is substantial agreement in the cases to the effect that such an arrangement may be assailed by creditors where it appears that the same was primarily intended as a means of hindering and delaying creditors, and at the same time of allowing the debtor to continue his business for his own advantage. In such cases the crucial test seems to be whether the arrangement is honestly entered into as a means of enabling the creditor to realize the largest amount possible out of the property mortgaged, or whether, on the contrary, the arrangement is made as a mere shift or device, entered into chiefly for the debtor's advantage, and whereby he is enabled to carry on the business without interference from other creditors and for his own advantage. We quote, in this connection, the language used by Mr. Justice Brewer in commenting upon certain decisions bearing upon this question, including *Robinson* v. *Elliott*, 22 Wall. 520. The distinguished jurist said: "In neither of those cases is it affirmed that a chattel mortgage on a stock of goods is necessarily invalidated by the fact that, either in the mortgage or by parol agreement between the parties, the mortgagor is to retain possession, with the right to sell the goods at retail. On the contrary, it is clearly recognized in them that such an instrument is valid, notwithstanding these stipulations, if it appears that the sales were to be for the benefit of the mortgagee. What was meant was that such an instrument should not be used to enable the mortgagor to continue in business as theretofore, with full control of the property and business, appropriating to himself the benefits thereof, and all the while holding the instrument as a shield against the attacks of unsecured creditors." We have quoted this language from the printed argument of counsel for the defendant, and we fully indorse the same as embodying a clear and satisfactory expression of the rule recognized by the better authorities as applicable to cases such as the case at bar. The following cases will be found to sustain the rule as formulated by Judge Brewer: *Whitson* v. *Griffis*, 39 Kan. 211, 17 Pac. Rep. 801; *Ephraim* v. *Keller* (Wash.) 18 L. R. A. 604, and notes (s. c. 29 Pac. Rep. 985; *Ethridge* v. *Sperry*, 139 U. S. 266, 11 Sup. Ct. 565, and note in 35 Lawyers' Co-op. Ed., at page 171; *Robinson* v. *Elliott*, 22 Wall. 513, and notes in 22 Lawyers' Co-op. Ed., at page 758; *Felner* v. *Wilson*, 55 Ark. 77, 17 S. W. Rep. 587; *Wilcox* v. *Landberg*, 30 Minn. 93, 14 N. W. Rep. 365. See cases collated 18 L. R. A., at page 604.

Applying this rule to the facts of this case, we find no difficulty in reaching the conclusion that the mortgage in question was not a fraudulent cover of Robinson's property. As has been seen, the debt secured by the mortgage was an actual debt, and the mort-

gage which gave the plaintiff its preference over other unsecured creditors was a valid and legal instrument. Upon the authority of the cases cited, it appears that the arrangement whereby Robinson was clothed with authority to sell the mortgaged property at retail for cash, and turn over the proceeds, was a lawful arrangement. Under the evidence it satisfactorily appears that this plan was adopted for no other purpose than that of realizing the greatest possible amount from the merchandise which was hypothecated to secure the plaintiff's debt. Counsel do not claim that the salary paid Robinson for selling the goods was excessive in amount, nor is it suggested that he did not honestly account for and turn over the proceeds of all sales, as he was bound to do under the arrangement. But counsel argue that the arrangement did redound praccally to the debtor's advantage, because, under it, he drew a salary sufficient in amount to defray his family expenses. We think this fact neither material nor suggestive of fraud. The creditor exercised its judgment in selecting Robinson as its salesman, and there is nothing in this selection, as we view it, which indicates either bad faith or an improper desire to especially subserve the interests of the debtor. The mere fact that circumstances made it expedient, as plaintiff thought, to employ Robinson, instead of another, seems to us of little weight, as bearing upon the main question, viz: whether the business was allowed to be conducted for the benefit of the debtor, and not chiefly for the creditor's advantage. It is manifestly true that the business, after April 15, 1895, was not operated as it had been previously operated, viz: as the business of Robinson, and conducted for his sole benefit. Quite the reverse is the fact. After said date the proceeds of sales no longer were under control of the debtor. They were pledged in advance to apply on the secured debt, and they could not be lawfully diverted into other channels by Robinson. But it is claimed that the vice of the arrangement consists of a secret trust between the debtor and the creditor, which is repugnant to the terms of the writing, and under which a portion of the proceeds of sales were to be diverted from the plaintiff, and appropriated by the debtor. Counsel cite the case of *Newell* v. *Wagness*, 1 N. D. 62, 44 N. W. Rep. 1014, as supporting this argument. The case cited is not in point. Its facts clearly distinguish it from the case at bar. In that case the debtor made a sham sale of his stock of goods, and to deceive the public made out and filed a bill of sale, which on its face purported to transfer an absolute title to the purchaser. In furtherance of the same fraudulent purpose, the debtor leased his store building, and gave possession of the goods and store to the ostensible purchaser. All this was done to hinder and delay certain creditors, and to enable the debtor to control the proceeds of the goods pretended to be sold. There are no similar elements of deception in this case. In the case at bar the instrument put on file is a mortgage, and by its own terms it looks forward to a sale of the mortgaged property by the mortgagor himself, with a view to liquidating the debt

secured by the mortgage, and this was its actual, as well as its ostensible purpose.

Further discussion of the facts in this record would seem to be unnecessary. The evidence clearly shows, and this is admitted by counsel, that, after the $900 paid as wages to Robinson is deducted from the total proceeds of the sales made at retail, the unpaid balance of the secured indebtedness, as it existed at the time of the determination of the case in the court below, was considerably greater than the value of the property converted by the defendants. We shall hold that such wages were necessarily and properly paid the mortgagor, as an item of expense incident to the retail sale, and that such sales were lawful under the facts and circumstances of this case. The judgment of the trial court will be affirmed. All the judges concurring.

(79 N. W. Rep. 880.)

THOMAS O'TOOLE, *et al. vs.* O. M. OMLIE, *et al.*

Opinion filed June 27, 1899.

Mortgages of Real Estate in Form of Absolute Conveyances.

On December 5, 1885, plaintiffs executed and delivered to defendant O. M. Omlie their deed of warranty of certain real estate owned by Thomas O'Toole. Later, and on February 1, 1887, plaintiffs executed and delivered to said defendant a quitclaim deed of the same land, which recited that the same was executed to perfect and make absolute the warranty deed. Both deeds were absolute on their face, and the same were duly recorded. *Held*, under the evidence, that both deeds were given as security, and the same were, as between the parties thereto, mere mortgages, and were not deeds of absolute conveyance.

Possession Notice to Purchaser of Rights of Occupant.

Subsequently, and in December, 1895, and while the plaintiffs were residing upon the land and had the exclusive and actual possession thereof, said defendant O. M. Omlie and his wife conveyed the land to the defendant David Lane by deed of warranty, which deed was duly recorded. *Held*, under the evidence, that the defendant Lane purchased with constructive notice of the plaintiffs' rights in the premises, and that Lane's estate and title in the land are subject and subordinate to the rights and equities of the plaintiffs.

Accounting Review on Appeal.

Under the evidence, the Court is unable to determine the state of the account as between plaintiffs and the defendant Omlie, and, accordingly, *held*, that the matter of the accounting asked for by the plaintiffs is not passed upon or determined in this action, and the same is therefore left open for future determination.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by Thomas O'Toole and Ann O'Toole against O. M. Omlie and David Lane, to have an instrument in form of a quitclaim deed executed by the appellants to O. M. Omlie and covering certain

lands in Pembina county, declared to be a mortgage, also for an accounting as against O. M. Omlie, and to have a deed from the defendant Omlie to defendant David Lane set aside. Judgment was given for defendants, and plaintiffs appeal.

Reversed.

George A. Bangs and *W. J. Kneeshaw,* for appellants.

The quitclaim deed given by appellants February 1st, 1897, was in fact a mortgage, because as shown by the evidence, the debt at the time of the transfer continued to exist thereafter. 1 Jones on Mtgs. 325; 3 Pom. Eq. Jur. § 1195; 2 Story Eq. Jur. 1018; *Voss* v. *Eller,* 7 Western Reptr. 361; *McMillan* v. *Bissell,* 5 Western Reptr. 706; *Huscheon* v. *Huscheon,* 12 Pac. Rep. 410; *Turpie* v. *Lowe,* 15 N. E. Rep. 834; *Kraemer* v. *Adelsberger,* 25 N. E. Rep. 859; *Dunton* v. *McCook,* 61 N. W. Rep. 977; *Keithley* v. *Wood,* 42 Am. St. Rep. 265; *Campbell* v. *Dearborn,* 12 Am. Rep. 671; *Riley* v. *Stan,* 67 N. W. Rep. 187. The great inequality between the value of the property conveyed and the price alleged to have been paid for it shows that it was intended as security only. 1 Jones, Mtgs. 329; *Cobb* v. *Day,* 17 S. W. Rep. 323; *Ferguson* v. *Bond,* 20 S. E. Rep. 591; *Gilchrist* v. *Beswick,* 10 S. E. Rep. 371; *Turpie* v. *Lowe,* 15 N. E. Rep. 834. The continued possession of the lands by plaintiffs is significant. 1 Jones on Mtgs. 328. The grantors continued to pay taxes and interest on the loan. *Kreamer* v. *Adelberger,* 25 N. E. Rep. 859; *Dunton* v. *McCook,* 61 N. W. Rep. 977. And understood the transfer to be as security only. *Cobb* v. *Day,* 17 S. W. Rep. 323. That it is competent to prove by parole that a deed absolute on its face was in fact a mortgage and to illustrate many of the circumstances controlling the determination of such cases, see *Mears* v. *Strobach,* 40 Pac. Rep. 621; *Clark* v. *Woodruff,* 51 N. W. Rep. 357; *Lounsberry* v. *Norton,* 22 Atl. Rep. 153; *Ray* v. *Tatum,* 72 Fed. Rep. 112; *Thorne* v. *Jay,* 45 Pac. Rep. 642; *Montgomery* v. *Beecher,* 31 Atl. Rep. 451; *Williams* v. *Chambers,* 26 S. W. Rep. 270; *Campbell* v. *Freeman,* 34 Pac. Rep. 113; *Robinson* v. *Bank,* 3 S. W. Rep. 656; *Jackson* v. *Lynch,* 21 N. E. Rep. 580; *Snow* v. *Pressy,* 20 Atl. Rep. 78; *Shields* v. *Russell,* 20 N. Y. Supp. 909; *McCauley* v. *Smith,* 30 N. E. Rep. 997. When on parole evidence it is doubtful whether the conveyance should be regarded by a court of equity as an absolute deed or as a mortgage the court will incline to hold it as being a mortgage. *Van Gilder* v. *Hoffman,* 22 W. Va. 1; *Gilchrist* v. *Beswick,* 10 S. E. Rep. 271; *Ferguson* v. *Bond,* 20 S. E. Rep. 591. If this conveyance was not a mortgage it operated to transfer or release the equity of redemption without the passing of any new consideration and with out any consideration except the satisfaction of the antecedent debt. In such case the release will only be sustained when it is bona fide, that is in all respects fair and for adequate consideration. *Ford* v. *Olden,* L. R. 3 Eq. Cas. 413; *Holdrige* v. *Gillespie,* 2 Johns. Ch. 23; *Baugher* v. *Merryman,* 32

Md. 192; *Linilell* v. *Liford*, 72 Me. 283; *Odell* v. *Montross*, 68 N. Y. 504; *Niggler* v. *Maurin*, 24 N. W. Rep. 369; *Marshall* v. *Thompson*, 39 N. W. Rep. 309; *Peugh* v. *Davis*, 24 L. Ed. 775; 6 Otto 332. The defendant Lane by his answer relies upon the defense that the instrument in question was an absolute deed. He cannot occupy the attitude of purchaser without notice and in good faith for the reason that this is an affirmative defense and should have been pleaded and proven. *Holdsworth* v. *Shannon*, 113 Mo. 508; 35 Am. St. Rep. 719; *Frost* v. *Beckman*, 1 Johns. Ch. 288; *Everts* v. *Agnes*, 4 Wis. 356; Story's Eq. Pl. §§ 28, 806 and 852; *Johnson* v. *Toulmin*, 52 Am. Dec. 212; *Cummings* v. *Coleman*, 62 Am. Dec. 402; *Baynard* v. *Norris*, 46 Am. Dec. 647; *Rover Iron Co.* v. *Trout*, 5 Am. St. Rep. 285; *Webber* v. *Rothchild*, 15 Pac. Rep. 650; *Moshier* v. *Knox College*, 32 Ill. 155; *Minor* v. *Willoughby*, 3 Minn. 225; *Jewett* v. *Palmer*, 7 Johns. Ch. 64; *Padgett* v. *Lawrence*, 10 Paige Ch. 170; *Wood* v. *Raburn*, 22 Pac. Rep. 521; *Eversdon* v. *Mayhue*, 3 Cal. 641; *Nautz* v. *McPherson*, 18 Am. Dec. 216; *Blake* v. *Jones*, 21 Am. Dec. 530; *Williams* v. *Shelley*, 37 N. Y. 375; *Richards* v. *Snyder*, 6 Pac. Rep. 186; *Byers* v. *Fowler*, 54 Am. Dec. 271; *Bryan* v. *Torney*, 21 Pac. Rep. 725; *Boone* v. *Chiles*, 10 Pet. 177; 6 L. Ed. 388; *Buchanan* v. *Wise*, 44 N. W. Rep. 461; *Hume* v. *Franzen*, 34 N. W. Rep. 490; *Rush* v. *Mitchell*, 32 N. W. Rep. 367; *Throckmorton* v. *Ryder*, 42 Ia. 84; *Berry* v. *Whitney*, 40 Mich. 65; *Lettson* v. *Reed*, 45 Mich. 27; *Mann* v. *Falcon*, 25 Tex. 271; *Landers* v. *Bolton*, 26 Cal. 393; *Long* v. *Dollarhide*, 24 Cal. 218. The deed from Omlie to Lane given in December, 1895, was void because the land was in possession of O'Toole claiming under a title adverse to Omlie. § 681 Civil Code, 1877; § 3303 Comp. Laws. The continued possession of the land by O'Toole after his formal conveyance of the legal title is a fact in conflict of the legal effect of his deed and is presumptive evidence that he still retained an interest in the premises and was sufficient to put Lane on inquiry and subject him to the rights of the party in possession. *Lipp* v. *Ry. Co.*, 40 N. W. Rep. 129; *Daniels* v. *Hester*, 7 S. E. Rep. 65; *Phalen* v. *Brady*, 1 N. Y. Supp. 626; *Hottenstein* v. *Larch*, 104 Pa. St. 454; *Boyer* v. *Chandler*, 32 L. R. A. 113; *Brook* v. *Bordner*, 125 Pa. St. 407; *Groff* v. *Ramsey*, 19 Minn. 44; *Palmer* v. *Bates*, 22 Minn. 532; *New* v. *Wheaton*, 24 Minn. 406; *Brinser* v. *Anderson*, 6 L. R. A. 205; *Gale* v. *Shillick*, 29 N. W. Rep. 661; *Peasley* v. *McFadden*, 10 Pac. Rep. 179; *Lambert* v. *Weber*, 47 N. W. Rep. 251; *Pell* v. *McElroy*, 36 Cal. 268; *Toman* v. *Bell*, 15 S. W. Rep. 886; *New* v. *Wheaton*, 24 Minn. 406; *Groff* v. *Bank*, 50 Minn. 234; *Knapp* v. *Bailey*, 1 Am. St. Rep. 295; *Brinkman* v. *Jones*, 44 Wis. 498; *Grimstone* v. *Carter*, 3 Paige Ch. 420; 1 Jones, Mtgs. 548.

Bosard & Bosard, for respondents.

In the absence of an allegation of fraud, accident or mistake, the terms of the deed could not be altered or explained by parole. 1

Rice, Ev. 259; *Osborne* v. *Hendrickson,* 7 Cal. 282; *Kritzen* v. *Mills,* 9 Cal. 22; *Aud* v. *Magruder,* 10 Cal. 282; *Richardson* v. *Scott,* 22 Cal. 150; *Ward* v. *McNaughton,* 43 Cal. 159; *Washabaugh* v. *Hall,* 56 N. W. Rep. 82; *Knudson* v. *Grand Council,* 63 N. W. Rep. 911; *Deering & Co.* v. *Russell,* 5 N. D. 319; *Northwestern Fuel Co.* v. *Bruns,* 1 N. D. 137; *Plano Mfg. Co.* v. *Root,* 3 N. D. 165; *National German Bank* v. *Lang,* 2 N. D. 66; *Thompson* v. *McKee,* 5 Dak. 172; *Dean* v. *Bank,* 6 Dak. 222; *Schmidtz* v. *Mining Co.,* 67 N. W. Rep. 618; *Strunk* v. *Smith,* 66 N. W. Rep. 926.

WALLIN, J. This action is brought to remove an alleged cloud upon the title to certain real estate described in the complaint, and situated in the County of Pembina, and upon which plaintiffs have at all times in question resided. Plaintiffs joined in the execution of two deeds of conveyance of the land to the defendant O. M. Omlie, both of which deeds were delivered and recorded. The first was a deed of warranty, made and delivered on December 5, 1885, and in which the defendant O. M. Omlie, the grantee, assumed and agreed to pay a pre-existing mortgage given by plaintiffs for $800, and which deed, it is conceded, was given as security for an indebtedness then due the grantee from said Thomas O'Toole. The other deed was delivered February 1, 1887, and was an ordinary quitclaim deed, except that it contained the following recital: "This deed is given for the purpose of perfecting and making absolute a trust warranty deed given by the first party on the 5th of December, 1885." Subsequent to the delivery of the quitclaim deed, the defendants O. M. Omlie and wife joined in a conveyance of the land by deed of warranty to the defendant Lane, which deed was dated December 4, 1895, and was recorded on the 14th day of the same month. The complaint alleges that defendant Lane received said last-mentioned deed with full knowledge of plaintiff' rights in and to the land. Plaintiffs allege that both of the said deeds to the defendant O. M. Omlie were, as between the parties, mere mortgages, and were given to secure an indebtedness due to said Omlie from said Thomas O'Toole; and plaintiffs ask that all of said deeds, including the deed to defendant Lane, be adjudged null and void, and declared to be clouds on plaintiffs' title. In effect, the complaint alleges that the indebtedness of Thomas O'Toole to O. M. Omlie, to secure which it is claimed that the two deeds were given to Omlie, has been fully paid; and the plaintiffs ask an accounting as between plaintiffs and O. M. Omlie, and aver a willingness to pay any possible balance found to be due from Thomas O'Toole to said O. M. Omlie, and secured by said deeds to him. The answer embodies a qualified general denial, and alleges that defendant Lane is a good-faith purchaser of the land. The answer admits the execution, delivery, and recording of all of said deeds, and admits and alleges that said warranty deed given December 5, 1885, was given and received as security, and

further alleges that said quitclaim deed was not given or received as security, but was an absolute deed, given to perfect and make absolute said warranty deed, to which it expressly refers. The answer further alleges that said quitclaim deed was given in payment for a debt of $900 then due from plaintiff Thomas O'Toole to the defendant Omlie. The action was tried in the District Court without a jury, and comes to this Court for a trial de novo. The District Court entered a judgment in favor of the defendants, adjudging, among other things: First, that the evidence did not enable the Court to make any accounting; second, that said first-mentioned deed (the deed of warranty given by plaintiffs to the defendant Omlie) was given as security only, and was, as between the parties thereto, a mere security; third, that said quitclaim deed given by plaintiffs to Omlie was not given or received as security, but the same was given as an absolute conveyance of the title to the land in question.

The case was submitted to this Court at the October term, 1898, and subsequently a decision was handed down. Upon plaintiffs' petition a rehearing was granted, and the case was again argued at the late March term. The reargument has led to a partial modification of the conclusions reached by this Court in its original decision. We adhere to our first view upon the question of an accounting as between the plaintiffs and the defendant Omlie. The evidence as to the amount of the indebtedness, as it stood when the quitclaim deed was delivered, is vague and unsatisfactory; and the evidence touching the condition of said account at the time of the trial is still more so, and is in fact wholly inadequate as a means of determining the true state of said account. We therefore shall attempt to make no accounting in this action, for the reason that the character of the evidence will not permit the Court to do so intelligently. The question of an accounting must, therefore, under the evidence in this record, necessarily be left for future investigation. In fact, this question has not been adjudicated either in the court below or in this Court, and the defendants have never offered a scintilla of evidence bearing upon this feature of the case.

But further investigation, and a more careful consideration of the evidence and of the law, has led the Court to change its views as to the character of the quitclaim deed or, rather, the purpose for which it was given and received. We are now of the opinion, and so hold, that said quitclaim deed was not intended to be an absolute deed of conveyance, as it purports on its face to be, but, on the contrary, as between the parties, the same was given and received as a mere security and mortgage. We cannot ascertain from the evidence the amount of the indebtedness then existing, which the quitclaim deed was given to secure, nor whether or not it was intended in part as a security for future advances to be made by Omlie to Thomas O'Toole; and therefore we shall limit our holding in this respect to the one single matter of the nature and objects of the instrument, and in so doing shall hold that the same was

given as security, and must be hereafter so construed as between the parties thereto. But such quitclaim deed is in form a deed of conveyance absolute on its face, and the same is therefore, as to strangers not in privity, a valid deed of absolute conveyance. It follows that the grantee named in the quitclaim deed received by it apparent authority to convey the land. Pursuant to such authority, Omlie and his wife, did by their deed of warranty convey the land in question to the defendant Lane. There is no evidence in the record tending to show that Lane actually knew that the quitclaim deed was given as a mere security, nor can this Court indulge any such presumption; but inasmuch as it appears that the plaintiffs were in the actual possession of the land, and resided thereon, when Lane purchased the same and received his deed of conveyance, it will follow that Lane had constructive notice of any rights which the plaintiffs had in the land, and received his deed with full notice and knowledge of such rights. It follows that Lane's title in and to the land in question is held subject to the plaintiffs' equities therein, whatever they may prove to be.

As has been seen, the unsatisfactory state of the evidence renders a final determination of the rights of the parties in the land impracticable in the present action, and we are further compelled to hold, under the statute controlling the action, that a new trial of the action cannot be accorded. Under these circumstances, we do not deem it advisable to elaborate upon the evidence, and have concluded not to do so, further than to point out certain features of the testimony which have operated to lead the Court to believe that the quitclaim deed from plaintiffs to Omlie was given as a mere security, and not as an absolute conveyance. We remark first that there is not a particle of evidence in the record tending to show any oral negotiations for a sale of the land. We regard this omission as being significant and important. Again, the evidence of Thomas O'Toole is emphatic that the quitclaim deed was asked for by Omlie as a security, and for that purpose only. This evidence was not denied or contradicted by Omlie, or by any witness in the case. If Omlie in fact bought the land outright, he was, we think, unaccountably remiss in not offering any oral evidence whatever tending to show the fact of such purchase. He saw fit, on the contrary, to stand on the recitals upon the face of the quitclaim deed, and did so despite the oral and documentary evidence offered by the plaintiff, strongly tending to show that the conveyance was in fact a mere security, and was so intended. It appears that at the time the quitclaim deed was executed and delivered the plaintiff Thomas O'Toole and his son Simon O'Toole executed two promissory notes, for $463.25 each, in favor of Omlie, and delivered the same to him; and the evidence has some tendency to show that the aggregate of the notes approximated the amount of O'Toole's indebtedness to Omlie at that time. In the absence of testimony

leading to a different conclusion, the inference is strong that the deed was given to secure the payment of the two notes, and was not given as an absolute conveyance. Again, it is conceded that Thomas O'Toole and his wife continued to reside upon the land after the delivery of the quitclaim deed, and were residing thereon at the time of the trial below,—a period of 12 years. This fact is also unexplained, and the same is, in our judgment, inconsistent with the theory of an absolute sale and conveyance of the land, and is all the more so when considered in connection with the undisputed testimony, showing that the plaintiff regularly paid the taxes on the land accruing after the execution and delivery of the quitclaim deed. The record is replete with testimony of financial transactions had between Omlie and O'Toole subsequent to the delivery of the quitclaim, and among such are receipts given to O'Toole by Omlie for moneys paid upon notes held by Omlie against O'Toole. Besides these items of testimony, other evidence in the record could be alluded to, having the same general tendency; but we deem it unnecessary to enlarge further upon the details of proof, but will only say that a most careful and repeated examination of the record has served to convince us that the evidence, when considered fairly, is sufficient to warrant the Court in holding that the quitclaim deed was a mere security, as between the parties. We concede, however, that there is some evidence pointing to a different conclusion. It cannot, however, be overlooked that the first deed given by the plaintiffs to Omlie, which on its face is an absolute deed of warranty, was given to secure an indebtedness of Thomas O'Toole to Omlie. This instrument operated to establish the relation of debtor and creditor, wherein the debt of the plaintiff Thomas O'Toole was secured by a mortgage given to defendant Omlie. This original transaction creates the relation of mortgagor and mortgagee, and it is elementary that under such circumstances a court of equity will exact from the creditor the utmost good faith in his subsequent dealings with the debtor with respect to the security involved. The following authorities are in point, as illustrating the jealousy with which a court of equity regards such transactions. Sedg. & W. Title Land, § 344; *Hyndman* v. *Hyndman,* 19 Vt. 10; *Niggeler* v. *Maurin,* 34 Minn. 118, 24 N. W. Rep. 369; *Odell* v. *Montross,* 68 N. Y. 499.

Our conclusion is that the judgment of the court below must be reversed, and we therefore direct the trial court to enter a new judgment, reversing its original judgment, and further adjudging, in substance, as follows: First, that said quitclaim deed described in the complaint, and given by the plaintiffs to defendant Omlie, was given as a security, and that the same, as between the parties thereto, was a mortgage of the land described in the complaint, and was not an absolute conveyance of said land; second, that the estate and title of the defendant Lane in and to said land are subject and subordinate to the rights and equities of the plaintiffs therein, and that Lane took title with constructive notice of all of

plaintiffs' rights and equities in and to the land described in the complaint; third, that the matter of the account, as between the plaintiffs and the defendant Omlie, is not adjudicated or determined in this action, but, on the contrary thereof, the matter of the accounting is left open for future determination. The appellants will recover their costs and disbursements in this Court and in the court below. All the judges concurring.

(79 N. W. Rep. 849.)

J. M. SMITH *vs.* THE SECURITY LOAN & TRUST COMPANY, *et al.*

Opinion filed June 15, 1899.

Trust Deed—Construction—Title Conveyed.

Under the direction of one Oliver C. Dalrymple, said defendant the Cass County Bank by deed of special warranty conveyed to one John C. Dalrymple certain real estate in trust for the use and benefit of the children of said Oliver C. Dalrymple, which children were also the children and minor heirs of a deceased wife of Oliver C. Dalrymple. By its terms, said special warranty deed did not require or authorize said John C. Dalrymple, as such trustee, or otherwise, to do any act, or perform any duty, or exercise any power with respect to said real estate, or with respect to the title thereto. Accordingly, it is *held*, construing Rev. Codes, §§ 3380-3383, inclusive, that said deed did not vest any title or estate whatever in said John C. Dalrymple, in trust, or otherwise, and that said deed operated under the statute to convey the whole estate, both legal and equitable, to said minor heirs of the deceased wife.

Deed Inoperative to Pass Title.

Subsequently said John C. Dalrymple, by deed of quitclaim duly executed and delivered, attempted to convey said real estate, in trust for the use and benefit of said minor heirs, to this plaintiff. *Held*, that no title or interest vested in the plaintiff by said deed of quitclaim. John C. Dalrymple, the plaintiff's grantor, had no estate, title or interest in the property, and hence could convey none.

Real Party in Interest.

Plaintiff brings this action as trustee of said real estate, for the use and benefit of said minor heirs, and prays that certain judgments described in the complaint may be adjudged to be clouds upon the title, not liens upon said real estate. The defendant interposed a demurrer to the complaint upon the ground that it does not state facts sufficient to constitute a cause of action. The District Court overruled the demurrer. *Held*, that such ruling was error. The plaintiff is not the real party in interest, nor is the plaintiff authorized to bring this action in his own name as a trustee of an express trust, nor can he sue in his own name for any reason mentioned in section 5223 of the Revised Codes.

Appeal from District Court, Cass County; *Lauder*, J.

Action by J. M. Smith, trustee for the use of Franklin S. Dalrymple and others, against the Security Loan & Trust Company of

Casselton and others. From an order overruling a demurrer to the complaint, defendants appeal.

Reversed.

Pollock & Scott, for appellants.

Plaintiff has no estate or interest in the real property in question and cannot maintain this action. Sec. 5904, Rev. Codes. The premises affected were the homestead of Isabella C. Dalrymple, her husband has the right of possession and occupancy until otherwise disposed of. Sec. 2463, Comp. Laws. Such homestead descends according to the law of succession. Comp. Laws, § 2464. That law vested the title in the husband and children. Comp. Laws, § § 3400, 3401. Consequently the title could not have passed from the Cass County Bank to John C. Dalrymple under the deed. There was no trust created in favor of John C. Dalrymple or J. M. Smith, his grantee, to the premises in question. Rev. Codes, Secs. 3380, 3401; *Murphy* v. *Cook,* 77 N. W. Rep. 387; *Townsend* v. *Frommer,* 125 N. Y. 446, 26 N. E. Rep. 805; *Considerant* v. *Brisbane,* 23 N. Y. 389.

Newman, Spalding & Stambaugh, for respondent.

The plaintiff may maintain this action as trustee of an express trust or a person in whose name a contract is made for the benefit of another. Sec. 5223, Rev. Codes. While an express trust must be created by an instrument in writing (Sec. 3385, Rev. Codes) it is not necessary in declaring upon a transaction, which the statute requires to be evidenced by a written instrument to plead the existence of the instrument. Stephen's Pleading, § 374; *Marston* v. *Swett,* 66 N. Y. 206; Gould on Pleading, § § 43 and 45; Bliss on Code Pleading, § 312. The allegation that this trust was for the use and benefit of the minor heirs of Isabella C. Dalrymple is sufficient under the rule that where by reasonable and fair intendment and liberal construction, it appears from the face of the complaint that a cause of action is stated, however inartificially, defectively or uncertainly stated, demurrer will not lie. *Phoenix Bank* v. *Dormell,* 40 N. Y. 410; *Maire* v. *Garrison,* 83 N. Y. 14; *Morse* v. *Gilman,* 16 Wis. 504; *Wall* v. *Bulger,* 46 Hun. 346; *Kimball* v. *Spicer,* 12 Wis. 669 *Lewis* v. *Stout,* 22 Wis. 234. The statute of frauds requiring express trusts to be in writing was enacted for the benefit of those claiming title under deeds or other instruments absolute on their face and not for the benefit of those seeking to defeat the operation of such deeds. Defendants cannot avail themselves of the benefit of the statute. *Allen* v. *Woodruff,* 96 Ill. 25; *Myers* v. *Myers,* 47 N. E. Rep. 309. The decision on demurrer is a judgment and not an order. *Bentley* v. *Jones,* 4 How. Pr. 335; *King* v. *Stafford,* 5 How. Pr. 30; *Lewis* v. *Acker,* 8 How. Pr. 414; *Staunton* v. *King,* 76 N. Y. 585; *United States Life Ins. Co.* v. *Jordan,* 21 Abb. N. Cas. 330. Plaintiff was entitled to judgment, on defendants' failure to answer or on their election to stand on their demurrer.

§ 5454, Rev. Codes; *Whiting* v. *Mayor,* 37 N. Y. 600. On affirmance this Court should direct judgment. *Fulton Fire Ins. Co.* v. *Baldwin,* 37 N. Y. 648-652.

WALLIN, J. In this action the defendants have appealed from an order overruling a general demurrer to the complaint. The only question presented for determination is whether the complaint alleges facts sufficient to constitute a cause of action in favor of the plaintiff. In disposing of the questions involved, it will be necessary to state only the substance of certain allegations of the complaint which we have deemed to be decisive of the result in this Court. The controlling facts may be stated briefly as follows: On the 3d day of May, 1891, and long prior thereto, one Oliver C. Dalrymple and Isabella C. Dalrymple were husband and wife, and on said date the wife dies, leaving surviving, besides her said husband, certain minor children, as her heirs at law. The names of said children are respectively as stated in the title of this action. Subsequently, and on the 8th day of April, 1896, said defendant the Cass County Bank was seised of fee-simple title in and to certain premises described in the complaint, viz: lots 3 and 4 in block 20 of the First addition to the Town of Casselton (now City of Casselton), in this state; and on said last-mentioned date said Cass County Bank, under the direction and instructions of said surviving husband of the deceased wife, conveyed said lots, by a special deed of warranty, to one John C. Dalrymple, a resident of the State of Pennsylvania, and who then was the guardian of certain property of said minor heirs situated in said State of Pennsylvania. With respect to such conveyance, and the conveyance of the same premises subsequently made to the plaintiff, the allegations of the complaint are as follows: "Which said deed and conveyance was so as aforesaid made to said John C. Dalrymple in trust for the use and benefit of the said surviving minor heirs of the said Isabella C. Dalrymple, and not otherwise. That thereafter, and on or about the 13th day of April, 1897, said John C. Dalrymple made, executed, and delivered to this plaintiff a quitclaim deed conveying said lots 3 and 4 in said block 20 of the First addition to Casselton as aforesaid to this plaintiff, which deed and conveyance was so as aforesaid made to this plaintiff in trust for the use and benefit of the said surviving minor heirs of the said Isabella C. Dalrymple, and not otherwise. That the said deed and conveyance was given and made by the said John C. Dalrymple to this plaintiff with the consent and at the instance and request of the said Oliver C. Dalrymple, the father of said minor heirs." The complaint further states "that this plaintiff, upon the execution and delivery to him of such deed, accepted the trust thereby imposed; and this plaintiff now holds the title to said lots in trust for said surviving minor heirs of the said Isabella C. Dalrymple, and not otherwise." This action is brought by said J. M. Smith, the plaintiff, as such alleged trustee; and the relief prayed for is

a decree declaring certain judgments to be clouds upon the title of said premises, and to remove such alleged clouds by a proper decree.

The primary question raised by the demurrer is whether said J. M. Smith, who sues as plaintiff, can maintain this action, or any action brought to protect the title to said premises, or otherwise, to vindicate the rights of said minor heirs in or to said premises. Defendants' counsel contend that the action cannot be maintained, under the provisions of sections 5221 and 5223 of the Revised Codes, because, as counsel claim, it appears upon the face of the complaint that the action is not prosecuted in the name of the real party in interest, nor is the same prosecuted in the name of either an executor, administrator, trustee of an express trust, or in the name of a person especially authorized by statute to sue. In our judgment, this contention is sound, and must therefore be sustained. After a careful consideration of the language of the complaint, we have no hesitation in holding that the same shows affirmatively that the plaintiff has no title or interest in the lots in question, either as an individual or as the representative of the minor heirs. We base this conclusion upon the explicit language of the statute, as well as upon decided cases which have construed the same statute. Section 3380 of the Revised Codes declares that "uses and trusts in relation to real property are those only which are specified in this chapter." Section 3381 is as follows: "Every person who by virtue of any transfer or devise is entitled to the actual possession of real property and the receipt of the rents and profits thereof is deemed to have a legal estate therein of the same quality and duration and subject to the same conditions as his beneficial interest." Section 3383 provides as follows: "Every disposition of real property whether by transfer or will, must be made directly to the person in whom the right to the possession and profits is intended to be vested, and not to any other to the use of or in trust for such person; and if made to any person to the use of or in trust for another, no estate or interest vests in the trustee; but he must execute a release of the property to the beneficiary on demand, the latter paying the expenses thereof." Section 3388 declares the purpose for which an express trust may be created, but these need not be set out in disposing of this case as no express trust appears to have been created in the case at bar. There is no allegation in the complaint that either of the said trustees as named in said deeds of conveyance are required or authorized by the terms of said deeds to do any act, or perform any duty, or to exercise any power whatsoever, with respect to said premises, or the title thereto, or for the benefit of said minor heirs. On the contrary, it appears by the complaint itself, when construed in the light of said statutes governing uses and trusts, that the trust is strictly a passive or dry trust,—a mere nominal trust.

Plaintiff's counsel contend that the complaint should be liberally construed, and that such construction will permit him to prove at

the trial any express or other trust which may exist in the plaintiff by the terms of the deeds or otherwise But this contention is untenable, because the pleading, as it stands, purports to set out the legal effect of the two deeds, and the plaintiff cannot enlarge the effect of his own language as pleaded. The deeds are not annexed to the complaint as exhibits, nor is a copy of any portion of either deed set out in the pleading in hæc verba. The pleader has elected to set out the legal effect of the two instruments of conveyance, and has done so in the language we have extracted from the complaint as above set out. For the purposes of a demurrer, the plaintiff is presumed to have stated his case as strongly as it can be stated. Nor will the Court presume that there is any other instrument, outside of the deeds under which the plaintiff can assume the rights and duties of a trustee of any express or other trust. There is no suggestion in the complaint that any trust ever existed in plaintiff's favor by virtue of any instrument other than the deeds mentioned in the complaint. It appears affirmatively that the conveyances were made in trust for the use and benefit of the minor heirs. Under the statute (section 3383), such conveyance should properly have been made directly to such minor heirs, inasmuch as they, as the sole beneficiaries under the deeds, are entitled to the possession and the rents and profits of the estate transferred. But, being made to a trustee, the same section applies, and declares "that no estate or interest vests in the trustee." The deeds, by their terms, purport to convey an equitable estate to said minor heirs, but under the operation of the statute (section 3380) the transfer invests the beneficiaries with the legal title as well; thus vesting in them both the legal and the equitable estate, which, of course, include the entire title and interest. In brief, the operation of this statute is to annihilate the trust estate. The only thing which such a trustee can do with respect to the property so conveyed is to release the same to the cestui que trust, and this he is, in terms, required to do on demand, and such release is only allowed to preserve the chain of title on the record.

The statutes which we have set out are literal copies of New York statutes, and they have frequently been construed by the courts of that state. The cases we cite from New York, as well as from other states where similar legislation exists, furnish abundant authority for the construction we have placed upon the conveyances under consideration. See *Rawson* v. *Lampman,* 5 N. Y. 456; *Wright* v. *Douglass,* 7 N. Y. 564; *Ring* v. *McCoun,* 10 N. Y. 268; *Bank* v. *Moran,* 30 Minn. 165, 14 N. W. Rep. 805; *Witham* v. *Brooner,* 63 Ill. 344. See further, 2 Perry, Trusts, § 298, and Id. § 520.

It must follow, as well from the express terms of the statute as from the construction placed thereon by the authorities above cited, that the order of the District Court overruling the demurrer to the complaint was erroneously made. The demurrer should have been sustained. The District Court will be directed to reverse such

order and enter an order sustaining the demurrer. All the judges concurring.

(79 N. W. Rep. 981.)

CHARLES E. WILSON *vs.* CASS COUNTY.

Opinion filed June 15, 1899.

Sheriffs—Fees.

Under chapter 67, Laws 1897, a sheriff is not entitled to a fee of five dollars upon each description for selling lands for delinquent taxes pursuant to judgment, where such lands are bought in by the treasurer for the county.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Charles E. Wilson against the County of Cass. Judgment for defendant, and plaintiff appeals.

Affirmed.

Cochrane & Corliss, for appellant.

The legislature intended to compensate the sheriffs for making sales under Chap. 67, Laws 1897. More acts are to be performed by the sheriff under this law than on other judicial sales. They are given compensation for levying a writ of attachment and for collecting moneys under the provisions of section 2 of the act, viz: "the same fees as are allowed by law upon execution in a civil action." Sec. 25, Ch. 67, Laws 1897. The fee is given either when he receives money or when he collects it without actually receiving it. Where the plaintiff in execution bids in the property so that not a dollar is actually received by the sheriff, the sheriff is nevertheless entitled to his fees under the statutes giving him fees for collecting money under execution. *Sharvey* v. *Iron Co.*, 58 N. W. Rep. 864; *Jurgens* v. *Hauser*, 47 Pac. Rep. 809; *Litchfield* v. *Ashford*, 30 N. W. Rep. 649. The cases which appear to hold the contrary rest upon the peculiar phraseology of the statutes giving fees only on moneys actually received. *State* v. *Prince*, 37 Pac. Rep. 291; *Coleman* v. *Ross*, 12 Pac. Rep. 648; *Fiedeldey* v. *Diserens*, 26 Ohio St. 312; *Peery* v. *Wright*, 45 Pac. Rep. 46. The word "collection" as used in this statute means that the sheriff has through the discharge of the duties cast upon him by law in and about the sale of property under process been the procuring cause of the plaintiff in the process realizing the amount due him. Where the creditor receives the money before sale the sheriff is entitled to his fee. *Hildreth* v. *Ellis*, 1 Caines Cas. 192; *Alchin* v. *Wells*, 5 Term. Rep. 470; *Campbell* v. *Cothran*, 56 N. Y. 282; *Bank* v. *Coal Company*, 68 N. Y. 585-590; *Parsons* v. *Bowdoin*, 17 Wend. 14; *United States* v. *Haas*, 5 Fed. Rep. 29; *Morse* v. *Gibbons*, 43 Cal. 377. See, also, *Baldwin* v. *Shaw*, 35 Vt. 272; *Boswell* v. *Dingley*, 4 Mass. 411; *Bullen* v. *Ansley*, 6 Esp. N. P. 111; *Rawstorne* v. *Wilkinson*, 4 M. & S. 256; *Earle* v. *Plum-*

mer, 1 Salk. 332; *Bolton* v. *Lawrence*, 9 Wend. 435; *Scott* v. *Shaw*, 13 Johns. 378; *Adams* v. *Hopkins*, 5 Johns. 253; *Miles* v. *Harris*, 104 Eng. Com. Law, 550; *Arnold* v. *Dinsmore*, 3 Cold. 235. The person or corporation on whose behalf the sheriff executes the process is liable for his fees. *Jurgens* v. *Hauser*, 47 Pac. Rep. 809; *Sharvey* v. *Iron Co.*, 58 N. W. Rep. 864; *Morse* v. *Gibbons*, 43 Cal. 377; *Baldwin* v. *Shaw*, 35 Vt. 272; *Campbell* v. *Cothran*, 56 N. Y. 281; *Boswell* v. *Dingley*, 4 Mass. 411; *Hildreth* v. *Ellis*, 1 Caines Cas. 192; *Rawstorne* v. *Wilkinson*, 4 M. & S. 256.

Morrill & Engerud, for respondent.

The law makes it the duty of the treasurer to attend at the sale and receive all money paid. Sec. 13, Ch. 67, Laws 1897. In cases where the property is bid in for the county no money is paid over, and there is no money to be received by any one. The words "money received and disbursed" as used in section 2082, Rev. Codes, and the words "receiving or collecting money" in the delinquent tax law of 1897 have the same significance. Sec. 5106, Rev. Codes.

BARTHOLOMEW, C. J. We are called upon in this case to construe an obscure statute. We can get but little light from authority. We grope in darkness in search of legislative purpose. In 1897 the legislature sought to clear up all delinquent real estate taxes for and prior to the year 1895. To this end it enacted chapter 67, Laws 1897. The act required the county treasurer to make out a list of lands on which there were delinquent taxes for the years named, with the amount of such tax, and file the same with the clerk of the District Court. Certain proceedings were then to be had which would result in a judgment against each description of land for the amount of such taxes, interest, penalties, and costs. If these judgments were not paid in a certain time, a copy was to be placed in the hands of the sheriff, and he was to advertise and sell the lands. But section 2 of the act provided that where the tax, exclusive of interest and penalties, upon any tract exceeded $100, the treasurer might make an affidavit that the property was rented, and thereupon the clerk should issue a writ of attachment, and place it in the hands of the sheriff, who should attach the rent and collect the same, and, if necessary, might sue for the same in his own name. The latter part of section 25 declares: "To the sheriff shall be allowed for serving the writ of attachment provided by section two, and receiving or collecting any money under the provisions of this act, the same fees as are allowed by law upon an execution in a civil action, and in case he brings suit as in section two provided, such additional compensation as the Court may allow." Section 2082, Rev. Codes, which fixes the fees of sheriffs, contains the following: Subdivision 11: "Levying writ of execution and return thereof, one dollar." Subdivision 21: "Advertising sale in newspaper, in addition to the publisher's fees, sixty cents." Subdivision 27: "Commission on all money received

and disbursed by him on execution, order of sale, order of attachment, decree or on sale of real or personal property shall be: (a) For each dollar not exceeding four hundred dollars, three cents. (b) For each dollar above four hundred dollars, and not exceeding one thousand dollars, two cents. (c) For each dollar in excess of one thousand dollars, one cent." Subdivision 28: "In all cases in the District Court where persons in whose favor the execution or order of sale is issued, shall bid in the property sold on execution or judgment, the sheriff or person making such sale shall receive the following compensation: (a) When the amount for which the property is bid in does not exceed one thousand dollars, the sum of five dollars and no more. (b) When the amount for which the property is bid in exceeds one thousand dollars, the sum of ten dollars and no more."

Plaintiff was sheriff of the defendant county. A copy of the tax judgment, duly rendered, under seal, was placed in his hands, and he properly conducted the sale thereunder. A large number of tracts were bid in for the county by the treasurer under the provisions of the law. There were no attachments under the provisions of section 2. The sheriff presented his fee bill to the board of county commissioners, claiming a fee of $5.60 for each description bid off for the county; the judgment in each instance being less than $1,000. The board refused to allow the bill in whole or in part. Plaintiff brought action to recover the same, and a general demurrer to his complaint was sustained. He appeals from the order, and the only question presented by the demurrer is whether or not he is entitled to such fees, under the act.

With some misgivings, we reach the conclusion that the order must be affirmed. It is respondent's contention that the sheriff is allowed fees only for services under section 2, while appellant plants himself upon the wording of the statute which says "receiving or collecting money under the provisions of this act"; and he cites authority to sustain the position that under an execution sale the sheriff "collects" the money realized, although he may never handle a dollar of it, and although the judgment creditor may bid in the property, and no money ever be paid over. We think the case at bar must be differentiated from that line of authority. We quote the thirteenth section of the act: "The sheriff shall sell by public vendue each piece or parcel of land separately in the order in which they are described in the judgment and by the description therein; but if the sum bid for any piece or parcel shall not be paid before the sale closes, he shall again offer such piece or parcel for sale. In offering the lands for sale, he shall state the amount for which each piece or parcel is to be sold, and he shall first offer each piece or parcel to the bidder who will pay the amount for which it is to be sold for the shortest term of years in such piece or parcel. If no bidder shall offer to pay such amount for any term of years, in the piece or parcel so offered, he shall then offer the same in fee to the highest bidder who shall bid not less

than the amount for which the same is to be sold. If no bidder offer to pay such amount for a term of years, and no bidder shall bid an amount equal to that for which the piece or parcel is to be sold, then the county treasurer shall bid in the same for the state or county at such an amount. The treasurer shall attend at the sale and receive all moneys paid thereon." While it is true that the sheriff makes the sale, yet there is another county officer who is required to "attend at the sale and receive all moneys paid thereon." It is not even the theory of the law that the sheriff should ever handle the money, or be in any manner responsible for it. The duty and responsibility are all thrown upon the treasurer. It was not the legislative intent that the sheriff should be regarded as "receiving or collecting" this money. Other provisions make this clearer. The sheriff sells under a certified copy of the judgment placed in his hands. He is not required to search for any property or make any levy. His copy of the judgment is his sole authority, both as to amount and property to be sold. Specific costs are allowed when attachments issue, but the writ, in terms, requires the sheriff to collect such costs under the attachment,—both his own and those allowed to the clerk. The only other costs mentioned in the statute are the clerk's costs as specified in section 25, but such costs must be included in the judgment, and the reason for the provision is plain. Under the provisions of section 6, the judgment must fix the exact amount of the lien against each description; and there is no authority in the law by which the amount of the lien thus fixed can be enlarged, nor is there any provision for collecting any accruing costs.

Again, appellant claims that he is entitled to the same commissions or fees that he would receive on sales on execution; in other words, if the property be sold to a third person, he would be entitled to a commission of 3 cents on the dollar for the first $400, and decreasing as the amount grew larger, while, if the sale be to the judgment creditor (and appellant claims the county would be the judgment creditor in this case), he would be entitled to a fee of $5 if the amount bid did not exceed $1,000, or $10 if it exceeded that sum. Now, section 13 of the act requires the sheriff, in offering the land for sale, to state the amount for which each tract is to be sold If it is to be sold for an amount to include his fees, how can he make such announcement? The amount depends entirely upon who purchases. To illustrate, let us assume that the judgment against a certain tract is $5. If it is to be sold to a third party for an amount to include the sheriff's fees, it must be sold for $5.15; but, if to the county, it must be sold for $10. Which shall the sheriff announce? Certainly not the latter, because that would require a third person to bid nearly double what would be required to satisfy the judgment. But, if he announce the former, then, if the treasurer bid the tract in, he is limited to that sum, because said section 13 declares, "If no bidder shall bid an amount equal to that for which the piece or parcel is to be sold,

then the county treasurer shall bid in the same for the state or county at such an amount." The fact is, the moment we undertake to add to the judgment an amount to cover sheriff's fees, we introduce an element of confusion that renders the statute impossible of execution. The legislature never contemplated anything of that kind ,but did contemplate that each tract should be sold for the exact amount established against it as a lien by the judgment of the court. So construed, the statute is harmonious and consistent in its operation, but to some extent inconsistent and incongruous in its wording. But we are required to regard the intent, rather than the wording. Appellant concedes that it was competent for the legislature to impose duties upon him for which it furnished no compensation, and that he is entitled to no compensation unless authority therefor can be found in this statute. We find no such authority; hence the order sustaining the demurrer to the complaint is affirmed. All concur.

ON PETITION FOR REHEARING.

The vigorous petition of learned counsel for a rehearing in this case requires notice. Counsel misapprehend the scope of the decision when they claim that it requires sheriffs to pay advertising expenses out of their own pockets. Sheriffs are required to post three notices of sale, and also to publish such notice in the newspaper designated by the county board. But in practice such publisher's fees are always paid by the county,—the sheriff incurs no liability. That plaintiff so understood it is clear from the fact that he claimed nothing on that account in his complaint. True, he claimed 60 cents upon each description for advertising, but that is simply his allowance in addition to publisher's fees, under subdivision 21, § 2082, Rev. Codes. As to that claim, we may say that he may have been entitled to 60 cents for advertising the sale under the tax judgment. He publishes one brief notice, which, while it contains no descriptions, answers for all descriptions contained in the judgment. By no possible construction could he be allowed 60 cents for each description contained in the judgment. The single fee is too infinitesimal for the law's notice.

The law of 1897 does not undertake to change the general policy of this state. The treasurer is the collector of public revenue, not the sheriff. Whatever comes to the hands of the sheriff under an attachment under section 2 of the act is turned over to the treasurer, not paid into court. At the sale the treasurer receives the money. All through the act the treasurer is the collecting officer for the county. We are unable to conceive how the sheriff can receive or collect money under this act, except under the attachment provisions; and his fees therein are specially fixed, and, if not collected on the attachment, they go into the judgment. All the clerk's fees for services before and after judgment are included in the judgment. The terms of the judgment are specific. The amount of the lien must be declared in the judgment. True, sec-

tion 11 uses the words "accrued costs" (not accruing costs), but full significance may be given to the words, if they cover the costs accrued and included in the judgment.

To avoid the position taken in the original opinion, counsel now argue that, since the money upon these sales is never received and disbursed by the sheriff, as to such sales he is in the same position that he occupies when the judgment creditor becomes the purchaser under execution, and hence there can be no uncertainty as to the amount of his fees. They must be $5 or $10 for each sale, depending upon the amount of the tax, and hence the amount for which the land must be sold can be announced in each instance. We cannot subscribe to this. How it can be said that the judgment creditor is the purchaser, when the land is sold to a stranger, we do not comprehend. Moveover, we do not hesitate to say that thus construed the statute would be an outrage upon the taxpayer. It is well known that the great majority of tax delinquencies are for small amounts assessed against the scanty homes of labor, or against outlying lots of little value, where the tax is but a few dollars,—often less than one dollar. To add to that sum a sheriff fee that would double or quadruple the tax, and compel the payment of the entire sum in order to accomplish redemption, would work an extortion hitherto unknown, even in the harsh and relentless proceeding of taxation. To illustrate this, we need only say that it is admitted that upon this basis plaintiff's fees for the tax sale of one year in the County of Cass would exceed $11,000. It has never been the policy of the legislature of this state to wrest money from the taxpayer, and devolve fortunes upon county officials, at any such high-pressure speed. This Court will not hold that the legislature so intended, until its language is free from uncertainty. Rehearing denied.

(79 N. W. Rep. 985.)

MORRIS ROSENBAUM, *et al. vs.* JERRY HAYES.

Opinion filed June 29, 1899.

Factor's Lien—Waiver.

The defendant, as sheriff, seized certain sheep on writ of attachment against the property of B. & Co. Plaintiffs sued the sheriff in replevin for the sheep, and alleged that, as agents and factors of B. & Co., they had made large advances of money to said B. & Co., and that they were in possession of said property as such factors, and had a lien thereon for such advances. On the first trial on this complaint the jury disagreed. At the close of the evidence upon the second trial the court intimated that it might find it necessary to direct a verdict for defendant; whereupon plaintiffs, while insisting that the complaint was sufficient and supported by the evidence, yet, to avoid such ruling, asked and obtained leave to amend by pleading ownership as to a portion of the property. Subsequently they served a proposed amended answer embodying such claim. Defendant in the meantime served notice of an application for an order setting aside the order allowing the amendment. While this was pending,

plaintiffs withdrew their proposed amendment, and offered another not claiming ownership. Ultimately the court set aside its order granting leave to amend and denying any amendment. *Held* that, by pleading or offering to plead ownership under the circumstances, plaintiffs did not waive their right to insist upon a factor's lien.

Factor's Lien Dependent Upon Possession.

A factor's lien, being dependent upon possession, will be lost by any voluntary surrender of such possession whereby the factor loses control of the property; and where the factor knowingly permitted the owner to take the property in his possession for several weeks, and treat it as his own and in his own interest, and largely denude it of value, and ship a portion of it in his own name, the law will conclusively presume that the factor's lien was lost.

Possession a Question of Fact.

But, if thereafter the remnant of the property be again placed in the hands of the factors as such, the lien will again attach, and, under the evidence in this case, it is *held* that plaintiffs were entitled to go to the jury upon the question of whether or not they were in possession of the property at the time of its seizure by defendant.

Appeal from District Court, Morton County; *Winchester,* J.

Action by Morris Rosenbaum and others against Jerry Hayes, as sheriff of Stark county. Judgment for defendant, and plaintiffs appeal.

Reversed.

A. B. Melville, J. G. Campbell, and *Ball, Watson & Maclay,* for appellants.

It has once been held in this case that under the evidence the question of delivery of possession was a question of fact. *Rosenbaum* v. *Hayes,* 5 N. D. 477. Defendant's motion for a directed verdict was equivalent to a demurrer to the evidence, and the rule in such cases is well settled. *Cameron* v. *The Great Northern Railway,* 8 N. D. 124, 77 N. W. Rep. 1016. It was not necessary to show the authority of the agent of the railroad company to issue the bill of lading even as against the company. A fortiori it was not necessary as against third persons. *Hanson* v. *Ry. Co.,* 41 N. W. Rep. 529; *Brooks* v. *Rd. Co.,* 21 Am. & Eng. R. R. Cas. 64. The bill of lading was admissible even though not authorized. *Prince* v. *Ry. Co.,* 101 Mass. 542; *Bryant* v. *Nix,* 4 M. & W. 775. It was error for the Court to strike out the drafts admitted in evidence to show payment. 1 Greenl. on Ev. § 38; 2 Greenl. on Ev. § § 475, 518; 18 Am. & Eng. Enc. L. 206; *State* v. *Brooks,* 52 N. W. Rep. 240; *Peavey* v. *Hovey,* 20 N. W. Rep. 272; *Baring* v. *Clark,* 19 Pick. 220. There never was a waiver of the factor's lien or an election to rely on the claim of ownership as against the attachment. But the claim of a factor's lien was not inconsistent with a claim of ownership if the latter claim failed through lack of proof of notice. *Holbrook* v. *Wight,* 35 Am. Dec. 610. Even if the claims are inconsistent plaintiffs made their election when they brought this action claiming under a factor's lien. 7 Enc. Pl. & Pr. 364, n. 1.

Election of remedies or waiver of lien is a defense which must be pleaded in order to be available. Rev. Codes, 5273; *Roberge* v. *Winnie,* 39 N. E. Rep. 932; *Nysewander* v. *Lowman,* 24 N. E. Rep. 355. Words, unless designed to influence the course of a party concerned and actually having that effect, will not constitute election. 7 Enc. Pl. & Pr. 367.

Alexander Hughes, James B. Kerr, and *George W. Newton,* for respondent.

The allegation that the sheep were attached and that they were levied upon by virtue of a writ of attachment is, in legal effect, an admission that the writ was issued in due course of law and that all the preliminary conditions to its issue existed and were complied with. *Bowersock* v. *Adams,* 55 Kan. 681; *Carpenter* v. *Sherman,* 35 Wis. 109; *Remington* v. *Benoit,* 36 Atl. Rep. 718. When a public officer has done an act which, if certain preliminary conditions have not been complied with, is illegal, it will be presumed that such preliminary conditions were complied with. Best on Ev. page 657, n. 1. One who claims that any such pre-requisite did not exist must affirmatively show the fact. *Nofire* v. *U. S.,* 164 U. S. 657, 17 Sup. Ct. Rep. 212; *Valley Township* v. *Bridge Co.,* 4 Kan. App. 622; *Board of Education* v. *Boyce,* 47 Pac. Rep. 1090; Ch. 110, Subd. 15 of Sec. 3, Laws 1897, page 178; *Knox County* v. *Bank,* 147 U. S. 91, 13 Sup. Ct. Rep. 267; *Long* v. *Rush,* 47 N. E. Rep. 156; *Carpenter* v. *Scott,* 53 N. W. Rep. 329; *Naslen* v. *Haynes,* 2 Nev. 53; *Didley* v. *Sherman,* 2 Nev. 67. A record is substantially a written history of the proceedings from the beginning to the end of a case. *United States* v. *Taylor,* 147 U. S. 698; In re *Bennett,* 84 Fed. Rep. 326. Courts take judicial notice of their own records and judgments. Subd. 19, Sec. 2, Ch. 65, Laws 1897; *State* v. *Stevens,* 56 Kan. 723; *State* v. *Bowen,* 16 Kan. 475; In re Bennett, 84 Fed. Rep. 327; *Poole* v. *Leroy,* 70 Ia. 275; *Pittel* v. *Ins. Co.,* 86 Fed. Rep. 255; *Kimball* v. *J. S. M. Co.,* 9 Col. 349; *Allen* v. *Swoope,* 44 S. W. Rep. 78; *Cent. Trust Co.* v. *Asherville,* 72 Fed. Rep. 365; *Bruckel* v. *State,* 19 Wis. 567. They may take notice of other records in the court, and are not bound to limit judicial notice to records in the case on trial. *Denny* v. *State,* 144 Ind. 517; *Fredericks* v. *Daniels,* 6 Mont. 462; *Washington Ry. Co.* v. *Ry Co.,* 160 U. S. 77; *Treat* v. *Dunham,* 41 N. W. Rep. 876. It is therefore incumbent upon this Court to take judicial notice of its findings and decision in *Rosenbaum* v. *Hayes,* 5 N. D. 476, where the Court find that the sheep in question were taken in replevin from Jerry Hayes who seized them as sheriff on attachment. Also in the case of *Ganz* v. *Beasley,* 4 N. D. 140, where the Court find that the defendants made a general appearance in that action, and that Joseph Ganz made and filed affidavit for attachment, that upon an attachment duly sued out Jerry Hayes as sheriff seized the sheep. The settled case on the last appeal (5 N. D. 476) is a record of the District Court in this

action, (Subd. 2, § 5489 Rev. Codes) and is made a part of the record in this appeal. It appears therefrom W. W. Beasley & Sons are the same firm as George M. Beasley & Co. That Jerry Hayes as sheriff attached at the suit of Ganz in 1893, as the property of Beasleys 5,600 sheep. Courts take notice of all prior proceedings in the case. Subd. 13, § 2, Ch. 65, Laws 1897. The word "proceedings" here means any step taken by a suitor to obtain the interposition or action of the court. *Irwin* v. *Bank*, 6 Ohio St. 81; *Dea* v. *Washington Co.*, 3 Neb. 118; *Wilson* v. *Mackin*, 7 Neb. 50; *State* v. *Stevens*, 46 Kan. 720. The papers in the attachment suit are sufficient prima facie evidence of indebtedness in action against the sheriff by a third party. *Treat* v. *Dunham*, 41 N. W. Rep. 876; *Howard* v. *Dwight*, 66 N. W. Rep. 935; *Hall* v. *Stryker*, 27 N. Y. 45; *Rinchey* v. *Stryker*, 28 N. Y. 45; *Fuller* v. *Sears*, 5 Vt. 527. The Court should inform the jury of facts of which it takes judicial notice. *State* v. *Stevens*, 56 Kan. 723. The sheep were not entrusted to appellants as factors in the due course of business. The fact that Beasley accompanied the sheep when shipped and unloaded them at Dickinson, disproves that they were in the possession of the railroad company as agent for plaintiff. Edwards on Bailments, 573; Hutchinson on Carriers, § 217; *Ill. Cent. Ry. Co.* v. *Morrison*, 19 Ill. App. 136; *Terre Haute & L. Ry. Co.* v. *Sherwood*, 132 Ind. 129; *Heller* v. *Ry. Co.*, 109 Mich. 53; 4 Elliott on Rys. § 1549-1552; *Burger* v. *Ry. Co.*, 75 N. W. Rep. 192; *Grieve* v. *Ry. Co.*, 74 N. W. Rep. 193; *Clark* v. *Ry. Co.*, 64 Mo. 240. The terms of the bills of lading disprove plaintiffs' contention. Porter on Bills of Lading, § 421, 424. The bill of lading could not represent the first train load of sheep because they were transported, unloaded and taken onto the range before the bill was made. Porter on Bills of Lading, § 424-425. The sheep were herded together on the range and no attempt was made to identify those included in the second shipment, to establish a lien thereon. Scheuler on Per. Prop. § 47; *Hamilton* v. *Robinson*, 8 Md. 321; *Foster* v. *Warner*, 49 Mich. 643; *McDowell* v. *Russell*, 37 Pa. St. 164; *Rosenberg* v. *Thompson*, 8 S. W. Rep. 895; *Kelley* v. *Kelley*, 77 Me. 135; *Robinson* v. *Holt*, 39 N. H. 557. The herding of the sheep on the range by herders employed by plaintiffs was not sufficient to create a factor's lien in their favor. 2 Kent's Com. 637; 2 Par. on Conts. (8th Ed.) 99; *Dixon* v. *Stansfield*, 10 C. B. 399; *Thacher* v. *Moors*, 134 Mass. 156. The herders were employed by plaintiffs through Beasley as agent. Beasley was not competent as the agent of plaintiffs to invest plaintiffs with possession by engaging herders on their behalf. *Wordall* v. *Smith*, 1 Camp. 333. The rule as to the change of possession from the principal to the factor and the continued possession necessary to protect the factor against an attachment by a creditor of the principal is the same as in the sale of personal property under a statute making such sales fraudulent unless accompanied and followed by an actual and continued change of possession. *Mc-*

Farland v. *Wheeler,* 26 Wend. 467; *Dook* v. *Brubaker,* 1 Nev. 185; *State* v. *Benham,* 84 N. Y. 638; *Parker* v. *Kendrick,* 29 Vt. 390; *Brunswick* v. *McClay,* 7 Neb. 137; *Rosenbaum* v. *Hayes,* 5 N. D. 479. The change of possession necessary to protect a sale of chattels against creditors of the vendor must be open, notorious, actual, visible, unequivocal, substantial and continued. *Claflin* v. *Rosenberg,* 97 Am. Dec. 340 and note; *Conrad* v. *Smith,* 2 N. D. 408; *Morrison* v. *Oium,* 3 N. D. 76; *Grady* v. *Baker,* 3 Dak. 298. That the property was in possession of the hired man of the vendor, who had agreed to take care of the same for the vendee is not sufficient change of possession to give notice to creditors. *Flanagan* v. *Wood,* 33 Vt. 327. Plaintiffs' claim of ownership was inconsistent with their claim for lien thereon. It amounted to a repudiation, waiver or abandonment of their lien claim. *Picquat* v. *McKay,* 2 Blackf. (Ind.) 465; *Hudson* v. *Swan,* 83 N. Y. 560; *Everett* v. *Buchanan,* 2 Dak. 260; 13 Am. & Eng. Enc. L. 624, note 2; *Cox* v. *Harris,* 62 Am. St. Rep. 188.

BARTHOLOMEW, C. J. The opinion upon a former appeal may be found in 5 N. D. 476, 67 N. W. Rep. 951. We restate the facts as there stated: The plaintiffs are seeking to recover in replevin the possession of 5,600 sheep from the defendant, who, as sheriff, seized them on attachment against George M. Beasley & Co. The plaintiffs base their right to possession upon a factor's lien for a general balance due them from Beasley & Co. on account of advances made by them as commission merchants to Beasley & Co. under an agreement that Beasley & Co. were to purchase sheep, and consign them to plaintiffs, in the City of Chicago, to be sold by plaintiffs, as commission merchants, on account of Beasley & Co.; all the surplus, after reimbursing the plaintiffs for their advances and expenses in the business, and after paying their commissions on such sales, to be turned over to Beasley & Co. There was evidence tending to prove that on the 11th of April, 1893, Beasley & Co. were, and ever since that day have been, indebted to the plaintiffs in the sum of about $16,000. If at any time before their seizure under the attachment by defendant the sheep in question came to the possession of the plaintiffs under the arrangement between them and Beasley & Co., then there attached to them a factor's lien in favor of plaintiffs for the general balance due them from Beasley & Co. 1 Jones, Liens § 418. The contract between plaintiffs and George M. Beasley & Co. is undisputed, as is also the general balance due plaintiffs. It follows, then, that plaintiffs should recover, if they show that the said sheep had come into their possession as such del credere factors, unless they have waived their lien. At the close of plaintiffs' testimony the Court, on defendant's motion, discharged the jury, and dismissed the complaint. From this order, and the judgment entered thereon, the plaintiffs appeal.

Respondent defends this action of the Court, first, upon the ground that, on the record, plaintiffs had waived their factor's lien, if

any they had. This proposition is based upon the following condition of the record: On the first trial of this case the jury failed to agree. On the second trial, after the evidence was closed, the Court intimated that it might direct a verdict for defendant. Thereupon counsed for plaintiffs, while insisting that the complaint was sufficient to sustain all proofs, yet, to save any question, asked and obtained leave to amend the complaint by setting up absolute title in plaintiffs to 4,400 head of said sheep, alleging that they were bought by George M. Beasley & Co. with plaintiffs' money, and under an express agreement that they were to be plaintiffs' sheep. Some testimony was taken on the point. At some time during the trial one member of the plaintiff firm had given testimony strongly supporting the allegation in the amendment. The jury, however, found against plaintiffs on this point, but found in their favor on the question of lien. That verdict was set aside on the former appeal by reason of misdirection of the jury. We infer that no actual amendment to the complaint had been made, because, after the record was returned to the District Court, plaintiffs served upon defendant a copy of a proposed amended complaint, embodying the allegation of ownership, with notice of application to the Court for an order allowing the same. This order must have been granted, as subsequently there was an application by respondent for an order setting aside such order of allowance; and, while this last application was pending, appellants, by leave of Court, withdrew their proposed amendment, and offered another, returning to the claim in the original complaint as we construe it. Subsequently the Court set aside its order granting leave to amend the complaint, but making both proposed amendments a part of the record. That left the case to be tried upon the original complaint. But respondent urges that, by claiming as owner, appellants waived their factor's lien. As all the matters here urged as ground for dismissing the action appeared of record when the last trial commenced, orderly practice required the motion based upon such record to be made at that time, and not after more than a week had been consumed in introducing appellants' testimony. But appellants do not seek to take advantage of this delay, and we pass it, simply noting it to discourage such practice. We think, however, that the doctrine of waiver has no application to this case. It is a well settled principle that, where a party who has a lien upon property is in a proper manner and for a proper purpose placed in a position where it becomes his duty to disclose the nature of his claim, if then he conceal his lien and claim ownership, and the other party acts upon such statement, the lienholder cannot afterwards change his position to the detriment of such other party, and assert his lien. He waived or abandoned his lien by concealing the same and asserting a title inconsistent therewith. It acts by way of estoppel. Necessarily this must be true, because no man is denied the privilege of establishing the truth, unless to permit him to do so would work a legal injustice to some other party. In every case that has been

cited to us, or that we have found, where it has been held that a lien had been waived by a claim of ownership, such claim had been first made and acted upon before any claim under a lien was disclosed. A reference to a few of the cases relied upon will disclose the grounds upon which they are based. *Everett* v. *Saltus,* 15 Wend. 474, was trover for some lead. Defendants had a lien upon the lead for certain freight, but, when the lead was demanded, defendants stated that they had bought it and paid for it, and would not do anything about it. A second demand was made, with an offer to pay any lawful demands against the same, and defendants replied that they would have no further communication on the subject. As a defense to the action, the defendants sought to set up their lien, but the Court said: "But, if the defendants had a lien, they waived it by not putting themselves upon that ground when the property was demanded by the plaintiff's agent. They claimed the property as purchasers, and said they would do nothing about it. They denied the plaintiff's right, and set up a title in themselves independent of the lien. Under such circumstances, a tender of the freight and charges was unnecessary." In *Mexal* v. *Dearborn,* 12 Gray, 338, the Court say: "The law will not allow a party to insist upon and enforce in his own behalf a secret lien upon personal property after he has claimed it unconditionally as his own, and has thereby induced another to act in relation to it, in some manner affecting his own interest, as he would or might not have done if he had been openly and fairly notified of the additional ground of claim. It would be fraudulent in him to practice such concealment to the injury of others; and, to prevent the possibility of attempts so unjust becoming successful, the law implies that an intended concealment of that kind is of itself a waiver of the lien." The case of *Hudson* v. *Swan,* 83 N. Y. 552, was replevin for a horse. Plaintiff claimed as sole owner of the horse, but the evidence showed that he at one time had a lien on the horse. Subsequently he supposed he purchased it, but the authority of the party who made the sale was denied. The jury were instructed that, if plaintiff failed to establish ownership, he might still rely upon his lien. But the appellate court said: "At no stage of the proceedings did he concede the defendants' title and limit his claim to one as lienor. No opportunity was given to the defendants to discharge any such lien. The plaintiff denied its existence by claiming as sole owner, and down to the last moment maintained that claim, and submitted it to the jury, who found against him. He must, in this action at least, stand or fall upon that claim; and we think it was error to instruct the jury that he could fall back upon his alleged lien. Many of the authorities hold that such a claim absolutely extinguishes a right of lien, and that it cannot be revived." The case of *Fowler* v. *Parsons,* 143 Mass. 401, 9 N. E. Rep. 799, is the converse of those we have been considering, and serves to illustrate the grounds upon which courts proceed. The action was replevin, both parties claiming ownership by their plead-

ings. The evidence showed that defendant, believing that he was the consignee of certain goods, paid the custom duties which were a lien thereon. Plaintiff, knowing that defendant claimed the goods, stood by and saw him pay the duties, and then replevied the goods from him. It was held that plaintiff could not recover without paying or offering to pay the customs duties, and that defendant had not waived his lien for the same. In that case plaintiff knew of the existence of the lien, and was in no manner deceived or misled upon that point by defendant's claim of ownership; hence the lien was not waived.

In the case at bar, appellants, in bringing the action, based their right of recovery, not upon any claim of ownership, but upon a factor's lien, and upon that only. It was to that claim that defendant answered. The whole case was tried upon that theory. At the close of the case appellants, while protesting that their complaint was sufficient, and was supported by the proofs, yet, to avert a threatened prejudicial ruling, asked leave to amend their complaint by adding a claim of ownership as to a portion of the goods. This was objected to by respondent as inconsistent with the original complaint. Ultimately the Court took that view of it, and appellants withdrew their proposed amendment; thus leaving the issues exactly as they stood from the first. If appellants waived any rights in this case, it was the right to plead ownership. They concealed any such claim, based their recovery upon a lien, and forced respondent to the expense of two trials on that basis. The Court was right in excluding an amendment setting up title. But, if an attempt to plead ownership waived the right of recovery upon the lien, then the two claims have been mutually destructive of each other. We do not think any such result should be permitted. None of the reasons for a waiver of the lien apply in this case. Respondent was appraised of it from the first. He could not have been deceived after all the facts had been brought out upon two separate trials. He had every opportunity to pay the lien, if he so desired. He was induced to take no step prejudicial to himself by reason of offered assertion of ownership. There never was a moment, and he knew it, in which appellants were not insisting upon their lien. There could be no waiver under such circumstances. Learned counsel also cite in this connection *Wingard* v. *Banning*, 39 Cal. 543, and *Cox* v. *Harris*, 64 Ark. 213, 41 S. W. Rep. 426. These cases are more strictly cases of election of remedies. In each case a party had a lien upon specific personalty, in one case dependent upon possession, in the other by mortgage. In each case he disregarded his lien, brought suit upon his claim, and attached the specific property. Failing to realize in attachment, he afterwards sought to claim under the lien; and it was held in each case that he had waived his lien; or, rather, that he had two inconsistent remedies, and, having elected to pursue one, he could not afterwards pursue the other, and that his first election was conclusive. Applying the principle of those cases to the case before us, we should say

that, instead of having waived their lien claim, appellants are necessarily confined to that claim. Having, in bringing this action, elected to claim under a lien, they cannot make an inconsistent claim of ownership.

But respondent further contends that the action of the Court in taking the case from the jury must be sustained upon the ground that appellants had entirely failed in their proofs. This Court has expressly repudiated the scintilla rule. *Fuller* v. *Elevator Co.*, 2 N. D. 220, 50 N. W. Rep. 359. To sustain a verdict, it must appear that it might have been reached by a jury in the exercise of an unbiased and unprejudiced judgment; and, on the other hand, where a case is taken from the jury, the defeated party has a right to have everything regarded as proven that his evidence has any fair tendency to establish. We recite some of the facts briefly: About April 10, 1893, George M. Beasley & Co. loaded 20 car loads of sheep on the cars of the Northern Pacific Railroad Company at Rosebud, Mont., and forwarded them to Dickinson, N. D. The day following the Beasleys shipped 20 additional cars of sheep by the same carrier from Rosebud to Dickinson. At the time of the last shipment, April 11, 1893, a bill of lading was issued by the agent of the railroad company at Rosebud which recites the receipt of 40 car loads of sheep from George M. Beasley & Co., consigned to appellants at Dickinson, N. D. This bill of lading was at once forwarded by mail by the Beasleys to appellants at Chicago, and was duly received by them. It is contended now, as it was upon the former appeal, that the delivery of this bill of lading to the consignees placed the sheep in their exclusive possession. We need not stop to discuss the general rule that fixes the factor's lien the moment he obtains exclusive possession as such factor. Respondent claims that the rule does not apply in this case, because there were shipping contracts issued which were noted on the bill of lading, and which must be considered therewith. Under such contract, the shippers were to remain in possession and accompany the stock and have charge of the same; and it seems that this was in fact done in this case. But we need not discuss the question whether or not, as between consignor and consignee, the possession could pass to the latter under these circumstances; nor need we discuss whether or not the appellants, conceding that they received the sheep, received them as factors; nor need we discuss certain parol evidence tending to show that the Beasleys employed certain persons for appellants, and placed them in charge of the sheep. In our judgment all these matters are here immaterial, because, conceding that appellants once had possession, we are all agreed that they subsequently lost and surrendered such possession. It stands undisputed in this record that early in June, 1893, said sheep were on the order of W. W. Beasley, a member of the firm of George M. Beasley & Co., driven from their feeding grounds, which were 35 or 40 miles distant from Dickinson, to the immediate vicinity of that place; that W. W. Beasley purchased lumber and erected sheds, hired 10 or 12

men, and had all of the sheep sheared. The time required was about two weeks, and Beasley paid all the expenses connected with the shearing. He sacked the wool, amounting to 60,000 pounds or over, and shipped it in his own name to a firm in Boston, Mass., and received not less than $6,000 therefor. These undisputed facts show conclusively that the Beasleys were at that time in actual possession of the sheep for their own purposes, in their own interests, and for their own benefit, and in no sense of the word as agents for appellants. True, W. W. Beasley testifies that Joseph Rosenbaum told him to have the sheep brought in and sheared; but such fact only makes the case stronger against appellants, as it shows that, if appellants had possession, they voluntarily surrendered the same, and that the Beasleys did not retake possession fraudulently or surreptitiously. Further, after the sheep were sheared, they were returned to the herders, who seem to have implicitly obeyed the Beasleys in all matters pertaining to the sheep, and driven back to their feeding grounds. In July George M. Beasley caused about 2,600 of said sheep to be selected out and driven to Dickinson, and shipped to appellants. There is no pretense that this shipment was made by appellants, or by their direction or request. It was an unequivocal act of possession and ownership on the part of the Beasleys. These actions are unexplained in this record, and their force is irresistible. True, it is not every temporary deprivation of possession that will defeat a factor's lien dependent upon possession. The property may be seized on legal process, or taken by fraud or force. This will not defeat the lien. It can only be defeated by some act of the factors, and he may temporarily relinquish custody, if he retain control. Mechem, Ag. § 1037, and cases cited. Possibly he might allow the principal to have temporary possession under an express agreement reserving the lien, without losing his rights as between the parties. 1 Jones, Liens, § 468. But none of these exceptions can aid appellants upon this record. We are clear that no verdict in favor of appellants, based upon any possession upon their part prior to August 4, 1893, could have been sustained; hence to that extent the Court was correct in taking the case from the jury. But, by reason of matters yet to be considered, the case must be reversed, and we have considered the possession thus far in order to eliminate useless matter from the case upon the next trial.

Appellants placed one P. J. Smith upon the witness stand, who, it was shown, was the general western agent of appellants in looking after their live-stock interests in Montana and North Dakota. This witness testified that, as such general agent, he received from George M. Beasley, on August 4, 1893, a writing as follows: "I this day turn over to Rosenbaum Bros. & Co. all of my sheep, which is about six thousand (6,000) head, now ranging on the Cannon Ball. Sheep are all branded with a red bar on back, thus |. George M. Beasley & Co." When this instrument was offered in evidence, respondent objected to its introduction upon the ground that it was

immaterial under the pleadings, and did not tend to show that plaintiffs were in possession or entitled to any factor's lien. The objection was sustained. This was error. It is true the complaint alleges that appellants obtained possession of the sheep under and through the bill of lading hereinbefore mentioned, but it also declared: "And plaintiffs further allege that, in addition to the said factor's and merchant's lien and bill of lading by which the said plaintiffs hold said sheep, it was expressly agreed, by and between the firm of George M. Beasley & Co. and plaintiffs, the firm of Rosenbaum Bros. & Co., that the firm of Rosenbaum Bros. & Co., plaintiffs, should have a lien as commission and merchant factors on said sheep for the general balance of sixteen thousand one hundred and sixty-three dollars and seven cents, and the said sheep were transferred to, and the possession of said sheep was transferred to, the said firm of Rosenbaum Bros. & Co., and said sheep were in the possession of said Rosenbaum Bros. & Co. at the time they were attached as hereinafter stated." Under this allegation, the exhibit should have been received. There was other evidence in the case tending to show that appellants were the factors of George M. Beasley & Co., that there was a large balance due them as such factors, and that they were entitled to a lien upon the sheep by express agreement, once the sheep came into their possession as such factors. This witness further testified that he had ordered 30 cars for the shipment of the sheep; that, after receiving such writing, he went to the herding grounds in company with one of the Beasleys, and ordered the herders to drive the sheep to the railroad; that they at once proceeded to do so; and that when they were within three or four miles of Dickinson, and while so obeying the orders of the witness, the sheep were seized by the defendant. It does not specifically appear that the herders knew who this P. J. Smith was or who he represented. But the evidence tends to show that they at once recognized his authority and proceeded to execute his orders. It tended to show that when the sheep were seized by respondent they were in the actual possession of P. J. Smith, as the general agent for appellants, for the purpose of immediate shipment and sale by appellants as the factors of George M. Beasley & Co. Appellants were entitled to go to the jury upon this evidence. There must be a new trial. Reversed. All concur.

ON REHEARING.

Respondent asks a rehearing upon the last proposition discussed in the foregoing opinion, and in an erudite petition he seeks to show that there was no evidence of possession upon which appellants were entitled to go to the jury. The question of possession is a question of fact, to be decided, ordinarily, by the jury. Whether or not there is any evidence in a case upon which a jury would be warranted in finding possession in a designated party is a preliminary question upon which the Court may properly pass. But the fallacy in respondent's reasoning consists in the fact that he

constantly places upon the testimony the most favorable construction that it will bear for respondent, and from that standpoint insists there is no evidence in the case upon which the appellants were entitled to the verdict of a jury, forgetting that it is our duty to place upon the testimony the most favorable construction for appellants that it will bear, and to regard all those facts as established which the evidence tends to prove. We do not care to add to what we have said concerning the admissibility in evidence of Exhibit 82. It was not intended to convey title, or to convey a right to a lien. The rights to the lien already existed, if once the factor came into possession. The evidence on that point is overwhelming, and the exhibit tends strongly to prove that the Beasleys had surrendered their possession and all right to control. It may be true that when it was executed both appellants and the Beasleys supposed that appellants were already in possession under the bill of lading. We have held that, as matter of law, they were mistaken in that; but that did not prevent appellants from subsequently acquiring possession, or the Beasleys from surrendering possession. The evidence tends to show that they executed the exhibit as evidence of such surrender, and it should be given effect accordingly. We have said that the factor's possession must be exclusive, but that does not mean that it must be actual and personal. Delivery by the owner to any person for the factor enables the factor's lien to attach at once, whether the delivery be to a common carrier, ship owner, warehouseman, or agent. 1 Jones, Liens, § 460. And the delivery may be constructive as well as actual. "It is only necessary that the goods should be so appropriated to the factor that they are assuredly under his control." Id. § 461. Learned counsel cite the case of *Flanagan* v. *Wood,* 33 Vt. 333. The first paragraph in that opinion declares: "The doctrine that an actual and visible change of possession must accompany every attachment and transfer of personal property was early adopted in this state, and has been steadily adhered to. It has been treated as our settled policy, and the business habits of our citizens have been conformed to it. Under our system of attachment, its practical application is of frequent occurrence, and numerous decisions of our courts have defined and illustrated its operation. From a rule of law so well settled, and so well understood and relied upon by the community, we are not at liberty to depart. The decisions in this state must therefore be our guide, and we can derive but little aid from the decisions which in other states and in England have materially qualified or altered the law in this respect." The Court then proceeds to hold, in a case where the facts are somewhat exceptional, but could readily be distinguished from the case at bar, that there was not that actual and visible change of possession which their law required. The case of *Gray* v. *Corey,* 48 Cal. 208, is also cited. The case is exceptional in its facts, and probably would not be followed now. It arose between a vendee and a creditor under a statute which declared all transfers of personalty fraudulent as to creditors, unless

followed by actual, immediate, and continued change of possession. These cases are not here applicable. A factor's lien depends upon the fact of possession, and not the appearance. Rev. Codes, § 4836. Our statute is like that of New York, and there it is held that possession means "such control of, or dominion over, merchandise as enables a factor rightfully to take it into actual custody without the aid of any new authority or document furnished by the owner." *Pegram* v. *Carson,* 10 Bosw. 505. The rule as between a vendee and creditor has been stated by this Court as follows: "What the law requires, and all the law requires, is that the conduct of the parties should clearly show a relinquishment of ownership and possession, and all right of control on the part of the vendor, and an assumption of ownership, possession, and control on the part of the vendee." *Morrison* v. *Oium,* 3 N. D. 76, 54 N. W. Rep. 288. How stood the parties under the evidence? That the Beasleys had surrendered all legal right to possession and control must be conceded. We think it must also be conceded that, the Beasleys having surrendered the right of possession and control to appellants, appellants had the legal right to take the property into actual custody without the aid of any new authority or document from the Beasleys. Had appellants done so? We undertook in the original opinion to show that such was the tendency of the evidence. Counsel insist that what was done by way of driving the sheep in was done in pursuance of the orders of the Beasleys. Possibly the evidence may bear that construction; but it will certainly bear the construction we gave it, and duty compels us to adhere to it. It is urged, however, that, as matter of law, the possession remained in the Beasleys, because the same herders (Beasleys' servants, it is claimed) that had been in possession remained in possession, and in this connection counsel rely upon *Flanagan* v. *Wood* and *Gray* v. *Corey,* in both of which the fact that the former servants of the original owner remained in charge was held to preclude the claim that there had been any visible change of possession. We have endeavored to show that the matter of visible change does not apply in this case or in this state. As between a vendee and an attaching creditor, an entire want of change of possession would not be conclusive as against the vendee. Rev. Codes, § 5053. A factor is in a worse position than a vendee, in that his lien depends upon possession; but, so far as visible appearances are concerned, he should be in no worse position, and the bona fides as between the Beasleys and appellants cannot be questioned upon this record. But were these herders the servants of the Beasleys? It does not appear that respondent knew they were or had any reason to so suppose. But it does appear, and must be held as established, that these herders had been employed by the Beasleys for appellants in April, and had so continued, and appellants paid them for their services during all that time. They never were the Beasleys' servants after they came into this state.

The fact that we hold that the sheep were in the possession of the Beasleys for a certain term does not change the contract of employment with the herders. But we are not prepared to go upon record as holding that, if these herders were in the Beasleys' employ up to August 4th, and were found on August 7th, with the same sheep in their possession, many miles distant from the place where they were on the 4th, such fact establishes, as matter of law, that there had been no change in the possession of the sheep. Rehearing denied.

(79 N. W. Rep. 987.)

WILLIAM A. ROBERTS *vs.* FIRST NATIONAL BANK OF FARGO.

Opinion filed June 15, 1899.

Part Payment of Past Due Obligation Not Good Consideration for Contract.

Part payment of an existing indebtedness which is due is not consideration for a new promise. Accordingly, *held*, that the promise of a creditor to his debtor, which is made at the time of a partial payment by the latter, that he will "take care of" a certain judgment against the latter in favor of a third person, is without consideration, so far as it is dependent upon such payment.

What Constitutes Consideration for Promise.

The consideration for a promise may be found in some prejudice either suffered or agreed to be suffered by the promisee, other than such as he is at the time lawfully bound to suffer. *Held*, that the facts stated in the opinion do not show that the promisee either suffered or agreed to suffer any prejudice, and hence the promise, which has no other support, is therefore without consideration.

Transfer of Chose in Action.

A chose in action may be transferred either by parol or by written assignment.

Conflict in Evidence is for Jury to Settle.

It appears that on January 30, 1896, one R. made a written assignment to the plaintiff of a money demand owned by her against the defendant bank; further, that prior thereto, and on January 25, 1896, the account was garnished by the intervener, who is her creditor. There is some evidence tending to show that she had assigned the account to plaintiff by parol about a month prior to the written assignment. *Held*, that under this conflict of evidence the material inquiry as to when the account was transferred so as to vest title thereto in the plaintiff was entirely a question for the jury.

Erroneous Instruction.

The Court, in substance, instructed the jury that, if they found that at a time prior to the garnishment an oral agreement for the sale of the account to plaintiff was reached, then they must find for plaintiff. *Held*, that this instruction was erroneous, for the reason that it permitted the plaintiff to recover upon the account, as against the intervener's garnishment thereof, even though the title thereto may not have vested in plaintiff prior to such garnishment; further, in

not confining plaintiff's right to an actual purchase of the account, as distinguished from an agreement to purchase.

Appeal from District Court, Cass County; *Pollock*, J.

Action by William A. Roberts against the First National Bank of Fargo. The Bemis Bros. Bag Company intervened. Judgment for plaintiff. From an order granting a new trial, he appeals.

Affirmed.

Ball, Watson & Maclay, for appellant.

While Matilda M. Roberts was bound to pay the indebtedness due to the bank she was not bound to mortgage her property for the purpose of raising the money. The detriment suffered by her from the giving of such mortgage furnished sufficient consideration to support the bank's promise to indemnify her against the Inman judgment. *McCraith* v. *Bank,* 10 N. E. Rep. 862; § § 3871-3872 Rev. Codes. The promise to take care of a liability means that the promisor will save the other party harmless and free from responsibility or that the promisor will himself pay the claim. *Yale* v. *Watson,* 55 N. W. Rep. 957; *Dover Co.* v. *Noyes,* 24 N. E. Rep. 53. The promise of the bank to take care of the Inman judgment was not within the statute of frauds. Brandt on Suretyship, § 72; DeColyar on Guarantors, 110; 8 Am. & Eng. Enc. L. 676, notes 8 and 9. The parol assignment to plaintiff of Matilda M. Roberts' claim against the bank was valid as against the garnishing creditor, although no notice of the assignment was given the debtor. 4 Am. Dig. (Cent. Ed.) 1213-1298, 1317.

Newman, Spalding & Stambaugh, for respondent.

Payment of an existing indebtedness due, is not a valid consideration for any new contract between the debtor and creditor. Bish. on Conts. § § 48, 49 and 50. It was beyond the power of the bank to act as broker to procure or negotiate loans. *Farmers, etc. Bank* v. *Smith's Exrs.,* 40 U. S. App. 690; *Dresser* v. *Bank,* 42 N. E. Rep. 567; *First Nat. Bank* v. *Hoch,* 89 Pa. St. 324; *Weckler* v. *Bank,* 42 Md. 581; *Shinker* v. *Bank,* 22 Ohio St. 516; *Matthews* v. *Skinner,* 62 Mo. 329; *Wiley* v. *Bank,* 47 Vt. 546. The officers of a bank cannot compromise or discharge claims belonging to the bank without authority of the board of directors. *Hodges' Exrs.* v. *Bank,* 22 Gratt. 51; *Davis* v. *Randall,* 115 Mass. 547; *Olney* v. *Chadsey,* 7 R. I. 224. Plaintiff's admissions against his interest must be taken as true. *Bullock* v. *Hooper,* 146 U. S. 368. By the original complaint, he averred the transfer to him of the Matilda M. Roberts' claim as of date January 30th, 1896. The amended complaint states an earlier date. The testimony shows that the statement in the original complaint was not made by mistake, therefore the first statement will be taken as true. *Elizabethport Mfg. Co.* v. *Campbell,* 13 Abb. Pr. 86-92.

YOUNG, J. At the trial of this action in the District Court the

jury returned a verdict for plaintiff for $3,842.29. The defendant and intervener made a motion for a new trial, which was granted. This appeal is from the order granting the new trial. Plaintiff is seeking to recover the balance of a debt originally owed by the defendant bank to his mother, Matilda M. Roberts, and assigned to him prior to the commencement of this action. The intervener, the Bemis Bros. Bag Company, is a creditor of Matilda M. Roberts, and it asserts a claim to such balance as may be due from the bank, basing its rights thereto upon a garnishment of the account which it claims to have made prior to the alleged assignment to plaintiff. The facts giving rise to the alleged indebtedness of the bank to Matilda M. Roberts may be stated as follows: Originally Matilda M. Roberts was indebted to the defendant bank in a large sum, upon certain promissory notes executed by her as maker. In addition she was liable to the bank as guarantor on three separate notes of other parties, which are named in the record as the Vidger & Huff, Foley, and Norcross notes, and which she had discounted at the bank. All of the foregoing indebtedness was secured by her mortgage upon property owned by her in Fargo, and known as the "Fargo Roller Mills." The defendant bank had instituted foreclosure proceedings to subject this property to the payment of the debt secured. Mrs. Roberts resisted the forclosure, and answered in the action. On July 25, 1890, a compromise settlement of the pending suit was made, which furnishes the cause of action which plaintiff sets up in his complaint. By the terms of this settlement, Mrs. Roberts was to withdraw her answer, and permit the bank to take judgment in the foreclosure action for the amount secured by the mortgage, which judgment amounted to $22,669.85; also, to give a quitclaim deed of the mill property to the bank, and surrender possession thereof to it immediately. There is practically no disagreement as to the foregoing facts, but it is the bank's contention that in addition thereto Mrs. Roberts was to get the Vidger & Huff, Foley and Norcross claims, which it then held with her guaranty, and which does not appear to have been released, in the form of new notes, guarantied as before, and deliver them to the bank in lieu of the old notes, and that this has not been done. It is conceded that the bank agreed to pay Mrs. Roberts the sum of $4,000 upon the performance by her of certain conditions, some of which we have mentioned, and a large portion of which it is beyond dispute that she kept. It appears that she withdrew the answer which had been interposed in the foreclosure proceedings; also, that she gave possession of the mill property to the defendant; further, that she prepared and executed a quitclaim deed, and offered to deliver it to defendant. It is conceded, also, that a portion of the $4,000 was paid to Mrs. Roberts, or to C. A. Roberts, her husband, for her, but the exact amount is in dispute. The motion for new trial was not addressed to the discretion of the Court, but was made entirely upon questions of law, and the order of the Court granting

the same must stand or fall according to the correctness of such determinations. Such reference to the facts as we make is only for the purpose of presenting the real questions before us.

In addition to other defenses,—including the interposition of the Vidger & Huff, Foley, and Norcross claims as offsets, to which reference has already been made,—defendant alleged, also, as an offset, that from and after April 22, 1893, it was the owner of a certain judgment rendered and entered against Matilda M. Roberts in favor of the Fargo Building Association on February 21, 1885, upon which there is claimed to be due the sum of $545.05, with 7 per cent. interest since April 27, 1885. This is known as the "Inman judgment." Plaintiff resists the allowance of this judgment as an offset upon the ground, as he asserts it, that the defendant bank had agreed to pay it, or at least to save Matilda M. Roberts harmless from it. To make this point clear, it is necessary to state that in 1887,which was prior to the transactions to which we have referred, Matilda M. Roberts was indebted to the bank in the sum of $35,000. In that year she borrowed $20,000 from one M. B. Erskine, and used the proceeds of the loan to reduce the amount she owed the bank. As security for this loan, she executed a mortgage upon certain real estate owned by her in the City of Fargo In all of the negotiations and matters connected with this loan, Mrs. Roberts was represented by C. A. Roberts, her husband. It also appears that George Q. Erskine represented the mortgagee's interests, and attended to the security. George Q. Erskine was also vice president of the defendant bank. The Inman judgment was a first lien upon the property which Mrs. Roberts was about to include in the mortgage for the $20,000 loan. It is at this stage of the negotiations, and under these circumstances, when the mortgage was about to be given, that it is claimed that George Q. Erskine promised C. A. Roberts that the bank would either pay this judgment, or at least hold Mrs. Roberts harmless from it. Upon this branch of the case the Court, in substance, instructed the jury that it was plaintiff's contention "that the defendant bank agreed to save the said Matilda M. Roberts harmless from anything due on said judgment," and that the allowance of the judgment as an offset depended upon the question "whether or not the bank agreed to save Mrs. Roberts from liability on account of said judgment" In granting a new trial the Court embodied in its order, as one of the reasons for granting it, the following: "The Court should not have submitted to the jury the question whether the defendant bank agrees to assume, and relieve Matilda M. Roberts from liability for, the payment of the Inman judgment, for the reason that, as matter of law, there was no consideration for such alleged promise or agreement." Counsel for the bank also urge other legal reasons in support of the decision of the trial court that it was error to submit to the jury the question as to the assumption by the bank of liability as to this judgment. It is unnecessary to set them out

here, for we are convinced that the Court's order was properly made, upon the particular ground specified, namely, that there was no consideration for the alleged promise. It is true, the bank received the $20,000 derived from the loan which Mrs. Roberts made from M. B. Erskine, and applied it upon her indebtedness. But in receiving it the bank obtained only what it was legally entitled to, and in paying it Mrs. Roberts only performed in part an existing legal obligation. It is a well-settled principle that the doing of an act which is required by previous agreement does not furnish a consideration for a new contract. For this reason it is held that the payment of a part of an indebtedness which is due is not consideration for a new promise. *Parmelee* v. *Thompson*, 45 N. Y. 58; *Kellogg* v. *Olmsted*, 25 N. Y. 189; *Royal* v. *Lindsay*, 15 Kan. 445; *Ayres* v. *Railroad Co.*, 52 Iowa, 478, 3 N. W. Rep. 522; Bish. Cont. §§ 48-50. This is conceded by counsel for plaintiff, and no claim is therefore made that the payment of the $20,000 created a consideration to support the alleged promise. Their contention is that the consideration is to be found in the prejudice suffered by Mrs. Roberts in the giving of a mortgage to M. B. Erskine, which upon its face did not show forth the truth. Section 3871, Rev. Codes, defines "good consideration" as follows: "Any benefit conferred or agreed to be conferred upon the promisor by any other person to which the promisor is not lawfully entitled or any prejudice suffered or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer as an inducement to the promisor, is a good consideration for a promise." It has already appeared that the bank received no benefit to which it was not lawfully entitled. It is clear, then, if there is a consideration in the transaction in question, it is to be found, if at all, in counsel's contention, namely, in some prejudice suffered by Mrs. Roberts, the promisee. All of the evidence in the record relating to the alleged promise of George Q. Erskine as to this judgment, which has been indiscriminately referred to as an agreement to pay, to indemnify, and to save harmless, is given by C. A. Roberts. There is nothing in the evidence to indicate that the payment of the judgment by the bank out of its own funds was contemplated even as a remote contingency by either party. The alleged promise was made at the time when the $20,000 mortgage was being executed to M. B. Erskine, and it is apparent that this Inman judgment entered into the subject of conversation between C. A. Roberts, who was acting for his wife, and George Q. Erskine, only by reason of a difference of opinion between the acting parties as to the form the mortgage should take in reference to the judgment which was a first lien upon the property about to be mortgaged. Roberts wanted it to appear upon the face of the mortgage that it was subject to the judgment. Erskine did not, but wished it to show upon its face that it was a first lien. We are not informed as to which party

prevailed, as the mortgage is not before us, but will assume that Mrs. Roberts finally consented to have the mortgage made as Erskine wanted it, and that it was so made. This transaction is explained by the witness C. A. Roberts in the following language: "I wanted to put that into the mortgage to M. B. Erskine,—this $20,000,—and I wanted to put it subject to this mortgage. That was the only lien on this land, and Mr. Erskine said he did not want that to appear there; that, while the bank was getting the money from M. B. Erskine,—this $20,000,—they expected to have to stand behind the whole deal, and it was not supposed that this land would be taken in on this mortgage. He did not want the Inman mortgage to appear in there, because he did not want M. B. Erskine to get the impression that they had taken incumbered property, or property that had an incumbrance on it. He said, in case it should ever come up, the bank would take care of it." The Inman judgment seems to have been recognized as a first lien which was both valid and collectible against Mrs. Roberts. No reason appears why at that time the bank should lose any part of its claim against her by paying or agreeing to pay this judgment against her out of its own funds. The evidence does not show that such a payment by the bank was ever referred to or talked about in any way. The nearest approach to it is contained in the last sentence of C. A. Roberts' testimony above quoted, where he testifies that "he (Erskine) said, in case it should ever come up, the bank would take care of it." It is possible to conceive of circumstances surrounding the use of the words quoted which would permit them to be interpreted as an agreement to pay or to indemnity, and as actually expressing that promise. But such conditions do not exist here. Neither is there any evidence from which an agreement to pay the judgment from its own funds can be inferred. The only discussion as to the judgment was as to whether the mortgage should or should not show upon its face this prior lien. Roberts did not wish to have his wife make written representations of title to the mortgagee which were not true. George Q. Erskine, acting for the mortgagee, desired that it should contain no reference to the prior lien, and to assure the mortgagor that in complying with his request, and executing the mortgage in the form desired, she would suffer no prejudice, made the promise that, if "it should ever come up the bank would take care of it." This promise goes solely to protecting Mrs. Roberts from prejudice which might otherwise have followed by reason of the mortgage not mentioning the Inman lien, and in our judgment, cannot be entended further. It is not shown that Mrs. Roberts suffered any prejudice, injury, or loss of any kind by reason of executing the mortgage in the form requested. On the contrary, it appears that no prejudice has resulted to her; further, that the promise by Mr. Erskine that the bank would take care of the judgment has been kept,—the bank buying it and taking an assignment,—and that Mrs. Roberts has

been caused no trouble by reason of the fact that the mortgage was not given in the form her husband desired. Under the facts as they appear in the record, we do not find that Mrs. Roberts either suffered or agreed to suffer any prejudice which would furnish a consideration for the alleged promise. Neither do we find that the promise narrated by C. A. Roberts went to the extent of being an agreement for paying the judgment, or indemnifying Mrs. Roberts against the necessity of paying it herself.

The remaining point relates to the right of the intervener to recover. This, so far as we have occasion to consider it, is dependent upon the question whether the actual transfer of the account against the bank by Matilda M. Roberts to the plaintiff occurred after or before it was garnished by the intervener. If it was assigned before the garnishment, and if the assignment is not otherwise impeached, then, of course, the intervener acquired no rights by its garnishment. Plaintiff's version is that this account against the bank, along with certain other property, was transferred to him by his mother, Matilda M. Roberts, in payment for services rendered by him after he was 14 years of age. The evidence discloses that the matter of the transfer was discussed by plaintiff and his mother about Thanksgiving time in 1895, and again at Christmas time of the same year. It is agreed that the garnishment summons was served on January 27 and 28, 1896; also, that Matilda M. Roberts executed a written assignment of this account to plaintiff on January 30, 1896, and as of that date. It will be noticed that intervener's garnishment was made prior to the written assignment, but subsequent to the oral negotiations. It is plaintiff's contention, however, that the transfer was concluded at Christmas time, and that the subsequent written assignment was merely a formal expression of a transaction which was formerly complete. If in fact it was actually assigned orally, as claimed, that would be sufficient, for it is not necessary that the assignment of a chose in action be in writing. *Howe* v. *Jones* (Iowa) 8 N. W. Rep. 451; *Moore* v. *Lowrey*, 25 Iowa, 336; *Perkins* v. *Peterson* (Colo. App.) 29 Pac. Rep. 1135. The intervener, on the contrary, interprets the conversations which occurred prior to the garnishment as altogether looking forward to the subsequent assignment which was made in writing after the garnishment; that is, it contends that the conversations amounted, at most, to no more than an agreement for a sale, and that the sale itself was not in fact made until the written assignment was executed. The question as to the actual time the account was transferred was submitted to the jury under instructions which the intervener deemed erroneous and prejudicial, and to which it excepted. These were urged as errors upon the motion for new trial. The Court so held, and, in granting the motion, inserted in its order, as a second reason therefor, the following: "That, as matter of law, the alleged assignment from Matilda M. Roberts to the plaintiff took effect from the date of the written

assignment, and was therefore subsequent to the levy and lien of the garnishment issued by the intervener." We do not agree to the reason given for sustaining the motion; for, in our judgment, the evidence upon the point now under consideration is not of that decisive character which will permit us to say, merely as matter of law, that the assignment took effect on January 30, 1896. On the contrary, we deem it entirely a question of fact for the jury to determine. As supporting January 30, 1896, as the date of the actual sale, there is the evidence furnished by the written assignment itself; also, plaintiff's original complaint herein, wherein he alleged that the account was assigned to him on that date. Further support is also found in certain portions of the evidence of the immediate parties to the transaction, from which a jury might conclude that the agreement made at Christmas time was merely an agreement to sell, and not an actual sale, or that it was merely a tentative arrangement, to be consummated at a later date by an actual assignment. Against this, however, stands the explicit statement of the plaintiff and his mother, in other parts of the record, that the settlement was entirely completed at Christmas. Just what this means is not clear, but the testimony of W. F. Ball, who was present and participated in the conversation, is explicit. Upon this point he testifies in this language: "We talked the matter over, and Mrs. Roberts said she had given her claims to Will, and Will had accepted them in full of all his claims against her that he had." It was properly a question for the jury to determine from this conflicting evidence when the actual sale was made. But the fact that the Court has given a reason for granting a new trial which is not considered sufficient is not important, for we find that it was properly granted upon other grounds which were urged in support of the motion. We refer to errors in the instructions to the jury, to which exceptions were taken by the intervener.

The following portion of the charge is urged as prejudicial: "It is admitted in this action that the written contract between the parties was dated January 30, 1896, but that the actual contract was made some time in December, 1895, or at least prior to January 26, 1896." Plaintiff's entire case hinged upon establishing an actual transfer of the account to him in December, 1895. That was the one important question of fact in issue. The statement that it was admitted "that the actual contract was made some time in December, 1895, or at least prior to January 26, 1896," coming from the Court, necessarily would have great weight with the jury. No such admission was in fact made. The statement by the Court is a mere inadvertence, but it went to the jury as an admitted fact, and a most important one. It is true that in other portions of the charge language was used which might be considered as modifying the portion of which complaint is made, but it is not sufficiently cured, in our judgment, so as to entirely remove the prejudice which must have followed it as an incorrect statement of a most material fact.

The following portion of the Court's charge is also urged as erroneous: "It is for you to say when Matilda M. Roberts and the plaintiff reached their agreement for the sale and transfer of the causes of action to the latter. If you find from the evidence that such agreement was actually reached and made on or prior to January 26, 1896, then you must find for the plaintiff, as against the intervener, Bemis Bros. Bag Company, notwithstanding the agreement was not reduced to writing until January 30, 1896." The error specified in the use of the foregoing language is that the jury are therein required to find for plaintiff if they shall find that an agreement for the sale of the account was reached and made prior to the intervener's garnishment; the particular error consisting in the Court's failure to make plaintiff's right to recover entirely dependent upon an actual prior sale transferring title to him at the time of the transaction, and in expressly allowing the plaintiff to recover even though the prior agreement was nothing more than an agreement to sell and transfer at some future date. We think the exceptions were well founded, and the instruction erroneous. The one vital question of fact was when, if ever, was this account actually sold to plaintiff? Not when was an agreement made to sell or for a future sale? Intervener's rights under his garnishment were not cut off by a mere agreement to sell, or agreement for a sale, which had not become operative to actually transfer the title to the account. The actual sale is the decisive test of the rights of plaintiff and intervener. A mere agreement upon terms of settlement between plaintiff and his mother, by which he was to release his claim against her for services, and she was to assign the accounts at some future time, is not enough. In order that plaintiff may prevail, it must appear that at some period of time prior to the garnishment their negotiations had reached a stage where the plaintiff had released his claim for services, and Matilda M. Roberts had actually transferred to the plaintiff the title to the account in question. Whether this was done by parol or written assignment is not material. It is the fact which controls, not the form. Under the instructions complained of, the jury were permitted to find for the plaintiff even though the Christmas agreement was no more than an agreement upon the terms of a settlement and for a future sale, in accordance with which the title to the account was to pass to plaintiff at a future date. This was prejudicial error, for, if the title to the account still continued in Mrs. Roberts at the time of the garnishment, the intervener, and not plaintiff, was entitled to a verdict. The order granting a new trial is affirmed. All concur.

ON PETITION FOR REHEARING.

Counsel for intervener in their petition for a rehearing urge that, as matter of law, the transfer of the account by Mrs. Roberts to the plaintiff must be held to have been made on January 30, 1896, which was the date of the delivery of the formal written assignment, and in this connection cite sections 3515, 3889, Rev. Codes,

which provide that grants and written contracts take effect only upon delivery. Our attention is also called to section 3888, Id., which provides that "the execution of a contract in writing, whether the law requires it to be in writing or not, supersedes all the oral negotiations and stipulations concerning its matter, which preceded or accompanied it." These sections do not militate against the view expressed in our former opinion; for we agree that if the plaintiff were relying upon the written assignment as representing the contract by which he obtained title, or if the evidence was conclusive that the sale of the account was not completed until the written assignment was executed and delivered, and that all that preceded were merely preliminary negotiations relative thereto, then the delivery of that instrument would, as matter of law, fix the date of the transfer. But such is not the case here. It has already been shown that it is a disputed question of fact whether the parties intended and understood that they had completed the transfer by the oral conversation, or whether the transfer stood open and suspended up to the time it was embodied in writing. This question is for the jury to determine, under proper instructions.

It is still further contended that, inasmuch as a formal written assignment was subsequently executed, all that preceded it was superseded by that writing, under section 3888, supra, and that the date of the delivery of the written assignment must therefore govern. It is apparent that this section is merely declaratory of the general rule that a written contract cannot be varied, contradicted, or modified by parol evidence of anything that occurred at or prior to the time when such written contract was executed. It is well settled that this rule applies only to parties and privies, and that "where the controversy is between a party to a written contract and one who is neither a party to it, nor a privy to one who is, the rule excluding parol evidence to explain, vary, modify, or contradict the writing does not apply. In such case neither the party nor the stranger to the contract is bound by the rule excluding parol evidence." See 11 Am. & Eng. Enc. L. (2d Ed.) 550, and cases cited; also, Greenl. Ev. § 279; 1 Rice, Ev. § 158. The intervener is a stranger to the written assignment, and cannot, therefore, invoke the application of the rule; and the jury must accordingly determine from the evidence when the account was in fact transferred, regardless of whether it was by parol or by written assignment. Our conclusion is supported by *Bell* v. *Offutt*, 10 Bush, 632, wherein the Court said: "If two persons enter into a verbal agreement about a matter as to which an enforceable parol contract can be made, it would be no defense, when one of them is sued for a breach of the contract, that he understood it would not be obligatory unless reduced to writing; nor does a contemporaneous agreement to reduce a contract to writing make its validity to depend upon its being actually reduced to writing and signed. The agreement to put it in writing amounts to no more than an agreement by the parties to provide a particular kind of evidence of the terms of the contract, and no

more prevented its enforcement upon other legal evidence than an agreement that they would go to a named individual, and state to him the terms of their contract, would render the testimony of any other competent witness inadmissible to prove what the contract was." Also, *Green* v. *Cole,* 103 Mo. 70, 15 S. W. Rep. 317, in which it is said that "there must be a mutual assent to all of the propositions; for, so long as any matter forming an element of the contract remains open, the contract is not complete. Though the terms of the contract may all be agreed upon, still, if the parties make it a condition to the existence of the contract that the terms agreed upon be reduced to writing and signed by them, there is no contract until this is done. On the other hand, it is well-settled law, that, where the parties have assented to all the terms of the contract, the mere reference to a future contract in writing does not negative the existence of a present contract. In other words, if the parties make an agreement which they intend shall be binding from the time it is made, effect will be given to it from that time, though they intend it shall be superseded by a more formal written instrument,"—and cases cited. See, also, *Steamship Co.* v. *Swift,* 86 Me. 248, 29 Atl. Rep. 1063; *Sanders* v. *Fruit Co.,* 144 N. Y. 209, 39 N. E. Rep. 75; *Hodges* v. *Sublett,* 91 Ala. 588, 8 So. Rep. 800; *Blaney* v. *Hoke,* 14 Ohio St. 292.

We have in the case at bar an alleged transfer of an account which can be lawfully made either by a parol or a written assignment. If it was in fact assigned by parol, and no condition remained to be performed to make it a completed transaction, then the title to the account vested in the plaintiff by virtue of such parol assignment, and such title so transferred connot be impaired by the fact that such transfer was evidenced by a written instrument executed at a later date. If, on the other hand, the transfer was not complete, and it was so understood between the parties thereto, until it should be reduced to writing, then the prior oral negotiations were merely preliminary to, and are superseded by, the written assignment, and that instrument is the contract by which the title to the account was transferred, and the date of its delivery fixes the date at which plaintiff obtained the title to the said account. There are cases which seem to announce a different rule,—among which is *Spinney* v. *Downing* (Cal.) 41 Pac. Rep. 797. But we think the prevailing and better rule is that given in *Bell* v. *Offutt,* supra. The petition for rehearing is denied.

(79 N. W. Rep. 993.)

EDGAR A. HOWSER *vs.* J. A. PEPPER.

Opinion filed July 1, 1899.

Election Contest Before District Court.

Section 566, Rev. Codes, relating to the trial of election contests

by the District Court, construed, and *held*, that said section does not confine the jurisdiction of the District Court to try election contests to a limited period. *Held*, further, that the purpose of said section is to create a speedier method of trying such contests than that afforded by the procedure applicable to ordinary civil cases. *Held*, further, that the jurisdiction of the District Court to try election contests, when acquired by service of the notice of contest, continues until such contest is tried or dismissed.

Best Evidence—Original Ballots.

The original ballots cast at an election are the best evidence to determine the result of such election.

Ballots Tampered With—Result.

Such ballots continue as the best evidence unless it appears that the officers charged with their custody have so kept them that there is a reasonable probability that they have been tampered with.

Official Canvass Not Impeached by Ballots.

When it appears that ballot boxes have not been kept by the person legally charged with their custody, and that they have been exposed to the reach of unauthorized persons for a considerable time, the ballots lose their character as the best evidence, and cannot be allowed to impeach the official canvass.

Name of Candidate Written or Pasted on Ballot.

When the name of a person is written or pasted upon the official ballot opposite the office to be voted for, it should be counted as a vote for such person for that office, even though there is no mark in the square opposite such name.

Stamped Ballots—Minus Inspector's Initials.

Ballots which do not have the precinct stamp and initials of the inspector are declared to be void by section 524, Rev. Codes, and should not be counted.

Marking Within Squares.

Section 491, Rev. Codes, as amended, which provides the methods by which the elector may indicate his choice of candidates, construed, and *held*, that said section, so far as it relates to marking within the squares, is mandatory, and that marks outside the squares are not legal marks, and are not to be counted or considered for the purpose of gathering the intention of the voter.

Indication of Voter's Choice of Candidate—When Given Effect.

A ballot on which the elector has marked a party square, and has marked the name of a candidate for an office in the opposition ticket, and has not marked the name of the candidate for such office on his party ticket by an individual mark, thus clearly expresses his intention to vote for the person whose name he has marked, and not for his party candidate, which intention must be given effect by counting it for the person whose name is so marked.

Disfiguration of Ballot—Presumption.

Where a ballot contains other than legal marks, such marks will be presumed to have been innocently or unintentionally made, and such ballot will be counted, unless it appears from the marks themselves, or by evidence aliunde, that they were intended as distinguish-

ing marks; and whether a ballot which has distinguishing marks will be held void in the absence of a statute so declaring not decided.

Ballot Marked by Straight Line Instead of Cross.

Section 491, Rev. Codes, as amended, only requires a mark in the square at the top of the party ticket, or "a mark or cross" in the square opposite the names of candidates. *Held*, that a ballot which is only marked with a single straight mark in the party square should be counted.

Tie—Determined by Lot—Certificate of Election.

Where an election for a county office results in two or more persons having an equal number of votes for the same office, neither one of such persons is entitled to be declared elected by the canvassing board until the result of such election is determined by lot, upon the notice and in the manner provided for in section 528, Rev. Codes, relating to the duty of the county auditor in case of tie votes; and a certificate of election issued prior to such determination is void.

Appeal from District Court, Nelson County; *Fisk*, J.

Action by Edgar A. Howser against J. A. Pepper. Judgment for defendant, and plaintiff appeals.

Reversed.

Templeton & Rex, for appellant.

The court below erred in sustaining objections to the admissibility in evidence of the ballots from Lee and Center townships. The true rule is as stated in *Sone* v. *Williams*, 130 Mo. 530, 32 S. W. Rep. 1016, that the ballots are the best and primary evidence provided they have been kept by the proper custodian in the manner required by law and have not been tampered with. When the boxes are produced and they and the ballots contained in them are fair on their face they are prima facie admissible and the burden of showing that they are not shifts to the other party. *Tebbe* v. *Smith*, 108 Cal. 101, 41 Pac. Rep. 454; *Dooley* v. *Van Hohenstein*, 170 Ill. 630, 49 N. E. Rep. 193; *Hartman* v. *Young*, 20 Pac. Rep. 17; *Apple* v. *Barcroft*, 158 Ill. 649; *Baris* v. *State*, 75 Tex. 420, 12 S. W. Rep. 957; *Hudson* v. *Solomon*, 19 Kan. 177; *Hunnicutt* v. *State*, 75 Tex. 233, 12 S. W. Rep. 106. Statutory provisions to be obeyed by the election officers are quite uniformly held directory, those to be obeyed by the voter mandatory. *Tebbe* v. *Smith*, 41 Pac. Rep. 454; *O'Gorman* v. *Richter*, 31 Minn. 25, 16 N. W. Rep. 416; *Peo.* v. *Livingston*, 79 N. Y. 279; *Horning* v. *Burgess*, 77 N. W. Rep. 446; McCrary on Elections, § 724. The ballot marked with a cross in the square at the head of the independent and democrat column and also a cross opposite respondent's name in the republican column should be counted for appellant. *Valier* v. *Brakke*, 64 N. W. Rep. 180; *McKittrich* v. *Pardee*, 65 N. W. Rep. 23; *Church* v. *Walker*, 10 S. D. 450, 72 N. W. Rep. 101. Else one mark neutralizes the other. *State* v. *Fransham*, 48 Pac. Rep. 1; In re Assessor, 40 Atl. Rep. 822. The ballot with a diagonal mark in the square at the head of the independent and democrat column

should be counted for appellant. The statute does not require a cross mark. Laws 1897, Ch. 76; *Tebbe* v. *Smith*, 41 Pac. Rep. 456. Our constitution (Sec. 129) provides for a secret ballot. So does the statute. Sec. 559 Rev. Codes; *Ex parte Arnold*, 128 Mo. 256, 30 S. W. Rep. 768. Certain of the ballots crossed opposite every name in the republican column are illegal as bearing distinguishing marks. Distinguishing or identifying marks are either marks of a kind not authorized by law or marks authorized by law which are put in unauthorized places. *Curran* v. *Clayton*, 86 Me. 42, 29 Atl. Rep. 930; *Parvin* v. *Wiemberg*, 30 N. E. Rep. 790, 130 Ind. 561; McCrary on Elect. § 724; § 559 Rev. Codes; *Attorney General* v. *McQude*, 94 Mich. 439; *Whittam* v. *Zahorik*, 59 N. W. Rep. 57; *Dennis* v. *Caughlin*, 41 Pac. Rep. 768; In re Ballot Marks, 27 Atl. Rep. 608; *Sego* v. *Stoddard*, 36 N. E. Rep. 204; *Zeis* v. *Passwater*, 41 N. E. Rep. 796; *Bechtel* v. *Albin*, 33 N. E. Rep. 967; *Lauer* v. *Estes*, 53 Pac. Rep. 262; *Oglesby* v. *Sigman*, 58 Miss. 502. Exhibits 3 and 8 have crossmarks outside of the squares. This kind of marking has been repeatedly condemned. *Vallier* v. *Brakke*, 64 N. W. Rep. 180; *Apple* v. *Barcroft*, 158 Ill. 649; *Curran* v. *Clayton*, 29 Atl. Rep. 930; *Taylor* v. *Blenkley*, 39 Pac. Rep. 1045; *Attorney General* v. *Gaser*, 102 Mich. 405; *Bechtel* v. *Albin*, 33 N. E. Rep. 967; In re Flynn, 37 Atl. Rep. 523; *Dennis* v. *Caughlin*, 41 Pac. Rep. 768; *Parvin* v. *Weimberg*, 30 N. E. Rep. 790. Exhibits 11 and 12 each were marked opposite the respondent's name, an attempt was clearly made to obliterate it by making other marks over the first, and on each ballot a well defined cross appears in the square opposite appellant's name. These circumstances indicate an honest purpose to vote for appellant and that the first mark was a mistake which the voter endeavored honestly but ignorantly to correct. *State* v. *Walsh*, 17 L. R. A. 364, 25 Atl. Rep. 1; *Dennis* v. *Caughlin*, 41 Pac. Rep. 768; *State* v. *Fawcett*, 49 Pac. Rep. 346. Exhibit "E" should have been counted for appellant. The fact that appellant's name was already printed upon the ballot did not destroy the effect of writing his name thereon. *Sannor* v. *Patton*, 155 Ill. 553. Nor does the fact that the name of E. A. Howser was written on Exhibit "E" instead of Edgar A. Howser deprive appellant of the right to have this ballot counted as a vote for him. *Newton* v. *Newell*, 26 Minn. 529; *State* v. *Foster*, 38 Ohio St. 599; Opinion of Justices, 64 Me. 596; *Attorney General* v. *Coldburn*, 62 N. H. 70; *Clark* v. *Board*, 126 Mass. 282; *Peo.* v. *Smith*, 45 N. Y. 772. The notice of contest was sufficient to allow the admission of the tallies in evidence. *Bragunier* v. *Penn.* 29 Atl. Rep. 12; *Hadley* v. *Gutridge*, 58 Ind. 302. The tallies should control the figures. *State* v. *McFadden*, 65 N. W. Rep. 800.

F. A. Kelly, and *Bangs & Guthrie*, for respondent.

Defendant's objection at the opening of the trial that section 566, Rev. Codes, had not been complied with and jurisdiction was lost,

should have been sustained. *Brown* v. *Hixon*, 45 Mo. 340; *Seeley* v. *Killoran*, 53 Minn. 240; *Costello* v. *St. Louis*, 28 Mo. 278; *Wilson* v. *Lucas*, 43 Mo. 290. The statute requires the inspector to retain the ballot box locked with the ballots in it for sixty days next after election. § 526, Rev. Codes. After the expiration of the statutory time for holding the ballots they ceased to have a legal existence. *State* v. *Bates*, 36 N. W. Rep. 17. The ballots for the four precincts under investigation by this contest were not in proper custody of law, had not been properly kept. The boxes into which they were placed were not sealed as required by law. In two of the precincts the ballots had not been kept by the officer required by law to keep them. They were offered in evidence ten days after they had ceased to have any legal existence. The burden of showing that the ballots offered in evidence were the identical ballots cast was upon contestant. Their integrity was sufficiently impeached to shift the burden of proof. *Hudson* v. *Solomon*, 19 Kan. 177; McCrary on Elections, § 478; *Dorey* v. *Linn*, 31 Kan. 758; *Murphy* v. *Battle*, 155 Ill. 182; *Albert* v. *Twohig*, 35 Neb. 563. Where the statute provides a mode of preserving the identical ballots for the purpose of being used as evidence the statute must be strictly followed. If it appears that they have been handled by unauthorized persons or that they have been left in an exposed and improper place they cannot be offered to overcome the official count. McCrary on Elections, § 471; *Butler* v. *Lehman* 1 Barb. 353; *Powell* v. *Holman*, 6 S. W. Rep. 505; *Hughes* v. *Holman*, 23 Ore. 48; *Tebbe* v. *Smith*, 108 Cal. 101; *Hartman* v. *Young*, 17 Ore. 150; *Peo.* v. *Burden*, 45 Cal. 241. The party offering the ballots to impeach the official returns must show affirmatively that they are the identical ballots cast. *Beall* v. *Albert*, 159 Ill. 126; *Fenton* v. *Scott*, 17 Ore. 189; *Newton* v. *Newell*, 26 Minn. 529; *Martin* v. *Miles*, 58 N. W. Rep. 732. The proviso in section 524, Rev. Codes, ameliorates the otherwise harsh rule of construction. The statute is directory as to the method of the voters designating his choice. *Dickerman* v. *Gelsthorpe*, 47 Pac. Rep. 999; *State* v. *Russell*, 51 N. W. Rep. 465; *Spurgin* v. *Thompson*, 55 N. W. Rep. 297; *Peo.* v. *McManus*, 34 Barb. 620; *Houston* v. *Steele*, 34 S. W. Rep. 6. The mark prohibited by law is such an one as shows an intention to distinguish the ballot from others of its class. *State* v. *Russell*, 51 N. W. Rep. 465; *Tebbe* v. *Smith*, 41 Pac. Rep. 454; *Houston* v. *Steele*, 34 N. W. Rep. 6; 33 Am. St. Rep. 625. Exhibit "E" should not be counted for either party because there is no cross or mark after the name of either candidate. Laws 1897, page 117; *Martin* v. *Miles*, 65 N. W. Rep. 889. Also for the reason that there is no evidence showing that Edgar A. Howser and E. A. Howser is one and the same person. *Vickery* v. *Burton*, 6 N. D. 245, 69 N. W. Rep. 193; *State* v. *The Judge*, 13 Ala. 805; Opinion of Justices, 64 Me. 596; Redman's Appeal, 174 Pa. St. 59; McCrary on Elections, 528-530. Exhibit "2" should

be counted for respondent, it is not a void ballot. *McMahon* v. *Polk,* 10 S. D. 296.

YOUNG, J. This is an election contest, prosecuted under article 12 of chapter 8 of the Political Code, and involves the office of clerk of court of Nelson county. The parties to the contest were rival candidates for that office at the November, 1898, elections. The official ballot of Nelson county consisted of two columns, the first containing the names of the republican candidates, and the second the names of the candidates designated thereon as independent-democrat; each column being under its party name. The contestant was the candidate of the party designated as independent-democrat, and his name was printed in the second column, belonging to that party. The contestee was the republican candidate, and his name was printed in the first, or republican, column. The official canvass of the precinct returns gave Edgar A. Howser, the contestant, 708 votes, and J. A. Pepper, the contestee, 711 votes. The latter was accordingly declared elected, and a certificate of election issued to him. Within the time limited by section 563, Rev. Codes, the contestant challenged the result of the canvass and the right of contestee to the office by serving notice of contest, wherein he set out at length the grounds of his contest, and alleged that he (Howser) had in fact received 712 votes, and that contestee, Pepper, had received but 701 votes, and in due time contestee answered such notice. The contest was noticed for trial by contestant for a regular term of the District Court of Nelson county held on January 16, 1899, as an adjourned session of the regular November, 1898, term, and was heard by the Court without a jury at such term on January 19, 1899. Prior to the introduction of the testimony, the contestee objected to the jurisdiction of the Court to try the contest at that term upon the ground that such contest had not been brought to trial within 20 days after the answer was served, and that no term of court had been appointed to be held within such 20 days, and that contestee had not been served with notice of hearing. This objection was overruled by the Court, and, we think, properly so. The objection is based upon section 566, Rev. Codes, relating to the trial of election contests. The part of said section which is pertinent is as follows: "The judge of the District Court, in case no term of such court occurs in such county within twenty days after the service of the answer in such contest, may appoint a term of such court therein; but if a term of court occurs in such county before that time, then the contest shall be tried at such term unless otherwise ordered by the Court. The District Court or the judge thereof may, upon ten days' notice by either party, try such contest at chambers at any place fixed by the Court." We find no reason for holding that this section was intended to confine the jurisdiction of the District Court to try election contests to a limited period. Such a conclusion cannot be sustained by its language nor by fair inference. On the other hand, the purpose of the section is clearly

to extend to the parties to election contests speedier methods of bringing the contest to trial than those afforded by the ordinary procedure in civil cases; and it is also apparent from an examination of the section that the time of trial is as much under the control of one party as the other. In the present contest the District Court acquired jurisdiction to try the issues by the service of the notice of contest within the statutory period. That jurisdiction continues until the contest is disposed of by trial or dismissed. The record shows that contestant gave the requisite notice of trial prior to the hearing. It was therefore properly before the District Court for trial. That court made a general finding that J. A. Pepper, who holds the office under a certificate of election issued in pursuance of the official canvass, received a majority of the votes cast at such election, and entered judgment confirming him in the right to hold the office. Contestant, Howser, appeals.

Contestant challenges the correctness of the official canvass of but four precincts, namely, the precincts of Center, Lee, Illinois, and Ora, and contends that a correct count of the ballots cast in these precincts, will, when added to the official canvass of the votes of the remaining precincts in the county, give him a majority of all the votes cast. The poll books and ballot boxes from these precincts were offered in evidence by contestant, and the ballots were counted in open court, and a stipulation of counsel was entered of record as to each precinct, showing the number of undisputed votes in each for Howser and for Pepper separately, as shown by the ballots in the boxes. There were, altogether, 13 ballots which were not included in the stipulation. These were submitted to the trial court as the only ballots in dispute, and they are here as the only ballots for us to consider. Our discussion is therefore limited to the four precincts named and the 13 disputed ballots, which are known in the record as Exhibits 1 to 12, inclusive, and Exhibit E. Contestee contended below, and strenuously instists here, that none of the ballots offered are entitled to credit, and are not competent evidence to impeach the official canvass, basing his objections upon the manner in which the ballot boxes were kept. It may be stated, as a general principle, that the original ballots cast are the best evidence from which to determine the result of an election. The difficulty does not consist in the rule, but is found in the preliminary question as to whether the ballots offered to impeach the returns are the original ballots, and in the same condition as when cast by the electors. The effect of the original ballots as evidence, and the degree of care required to continue them as controlling evidence, is stated by Judge Brewer in *Hudson* v. *Solomon*, 19 Kan. 177, in the following language: "First, As between the ballots cast at an election and a canvass of these ballots by the election officers, the former are primary,—the controlling evidence. Second. In order to continue the ballots controlling as evidence, it must appear that they have been preserved in the manner and

by the officers prescribed by the statute, and that, while in such custody, they have not been so exposed to the reach of unauthorized persons as to afford a reasonable probability of their having been changed or tampered with." There are cases holding that the mere opportunity to tamper with the ballots entirely discredits them. See McCrary, Elect. (4th Ed.) § 471, and cases cited. We think the prevailing and better view is that expressed by Judge Brewer. This is supported by *Sone* v. *Williams* (Mo. Sup.) 32 S. W. Rep. 1016. See, also, *Fenton* v. *Scott,* 17 Ore. 189, 20 Pac. Rep. 95. The duties imposed upon officers to whom the ballot boxes are intrusted is found in section 526, Rev. Codes, which is in part as follows: "The inspector of elections shall lock the ballot box after the ballots have been replaced therein, in the presence of the judges, and shall send the key properly labeled with the name and number, of the polling precinct at the same time as he returns the poll books and statement to the county auditor, but shall retain in safe custody the ballot box used at the election, sealed, with all the ballots cast at the same replaced therein, during sixty days next after election. And it shall be his duty to cause the said box to be safely delivered to the county auditor upon the written request of the board of canvassers at any time during said sixty days. In organized townships within thirty days after said date, or in cities or villages, the inspector of elections shall deliver, if he is not himself the officer in question, the boxes to the chairman of the board of supervisors of the civil township, or mayor of the city or president of the village, in which the election precinct is situated, as the case may be; and this officer shall keep in safe custody such boxes until the next election or hand them over to his successor in office to be by him safely kept until such time." Upon the question whether the provisions of a statute providing for the preservation of ballots is directory or mandatory, McCrary, Elect. (4th Ed.) § 473 gives the rule, as we think, correctly, as follows: "The better opinion seems to be that, if the deviation from the statutory requirements relating to the manner of preserving the ballots has been such as necessarily to expose them to the public or unauthorized persons, the Court should exclude them; but, if the deviations have been slight, or of such a character as not necessarily to render doubtful the identity of the ballots, the question of the identity may well go to the jury to be determined upon all the evidence." *Mallett* v. *Plumb,* 60 Conn. 352, 22 Atl. Rep. 772.

The first question, then, is, are the ballots from these four precincts controlling evidence under the foregoing principles? As to the precincts of Center and Lee, we are of the opinion that they are not, and to this extent agree with the trial court in refusing to consider them; and in so holding we are largely controlled by the fact that there is no pretense that the ballot boxes for these precincts were in the custody of the inspectors who were charged

with the duty of keeping them safely, at any time after the night of the election. The inspector for Center precinct took the ballot box to his father's house on the night of the election, and left it in a room upstairs, which was occupied by his two brothers, aged 18 and 24, as a bedroom, which was generally accessible to the family, which was ten in number. The inspector, who lived with his father, went to Minnesota in December, where he remained, and did not testify at the trial. The box was produced by his father. The ballot box for Lee precinct was taken by the inspector to the house of one of the judges of election upon the night of the election, where the inspector got it the day before the trial, and produced it in court, not having it in his custody in the meantime, or having even seen it. In both precincts there was an entire absence of official custody of the ballot boxes. This fact, taken in connection with the further fact that the boxes were within the reach of unauthorized persons for a period of 70 days prior to their production in court, in our judgment destroyed their probative weight as the best evidence, and they cannot, therefore, be allowed to impeach the canvass of the votes by the precinct officers, which was made by them as the representatives of the two political parties, in public, and under the observation of the friends of the rival candidates. The official canvass, as declared by the canvassing board, will stand therefore as to the precincts of Center and Lee. Two of the disputed ballots—Exhibits 10 and 11—come from these precincts. By the rejection of the ballots as a whole, these two exhibits are removed from our further consideration. The conditions as to the custody of the ballot boxes are different in the two remaining precincts. In both the ballots were returned to the boxes immediately after the votes were canvassed. The boxes were locked, and the keys sent to the county auditor. The inspectors took charge of the ballot boxes, and continued in charge of them up to the time when they produced them in court, and unlocked them with the keys produced by the county auditor. The evidence is silent as to where the inspector of Illinois precinct kept the ballot box, but it shows that he kept possession of it, and that it was locked with a padlock, and was not opened. The degree of care shown to have been exercised in the preservation of this ballot box, taken in connection with the evidence of the inspector and that furnished by the ballots themselves, satisfies us with the integrity of the ballots of this precinct. We must therefore determine how the disputed ballots from the precinct shall be counted. They are Exhibits 12 and E. The official canvass of the precinct gave Howser 34 and Pepper 6. The count of the ballots for clerk of court made in court by stipulation gave Howser 33 and Pepper 6 undisputed votes with Exhibit E and Exhibit 12, in dispute, and one blank not to be counted for either. It is clear, then, that one of these two exhibits was counted for Howser at the precinct canvass to make up the 34 votes counted for him, and it is also clear that the vote counted was Exhibit 12,

for, as appears later, Exhibit E was not counted at all. The question now is, was it properly counted for him? We have concluded that it was. This ballot shows what is known as a "mixed" ticket, in which the voter has made a cross in the squares opposite the name of the candidate for whom he desired to vote. There is a cross in the squares after the names of both candidates for clerk of court, and that after Howser's name is very distinct, but the one after Pepper's name bears unmistakable evidence of an attempted erasure. The precinct canvassers determined from this ballot that the voter intended to vote for Howser, and so counted it. Our examination of the ballot as it now appears does not lead to a different conclusion. It was properly counted for Howser. The only ballot, then, which can affect the official canvass of this precinct is Exhibit E, which we will now consider. Its identity is established by the evidence of the inspector, also by the return to the auditor, as a vote cast, but not counted, because not marked with a cross. On this ballot the name of J. A. Pepper is erased, and the name of E. A. Howser is written underneath upon the proper line. No cross or mark of any kind appears in the square opposite Howser's name or elsewhere. The precinct board refused to count it, because it was not marked with a cross, and so certified in their returns to the auditor, and returned the ballot with the returns properly sealed. This should have been counted for Howser. Section 491, as amended by chapter 76 of the Session Laws of 1897, does not require a cross or mark opposite names which have been written or pasted upon the official ballot opposite the office to be voted for, to entitle them to be counted. This vote is to be added to Howser's official vote in this precinct. The ballot box of Ora precinct, as has been stated, was at all times in the custody of the inspector, but it was not kept with the same degree of care as that of Illinois precinct. The box was kept by the inspector in his house, in an addition thereto which was used generally for storing various articles. This room had outside windows, but no outside door, the entrance was from the main part of the house, through a door which was not kept locked. The room was generally accessible to the members of his family, which was eight in number, and to his hired men, of whom he had several at different times. Under the strict rule that a mere opportunity for tampering is sufficient to discredit ballots, and destroy their character as the best evidence, we would be inclined to hold that the ballots of this precinct, under the above facts, would be without probative weight. But under the rule that the exposure must have been such as to create a reasonable probability that they have been tampered with,—which we consider the better rule,—we think these ballots must be considered. There is no evidence which even tends to show any tampering with the ballot box or the ballots. The contest as to every vote depends wholly upon the interpretation to be given to the markings on the ballots. In this precinct the inspector kept the box in as secure a place as he could. It

was possible for tamperers to get to it, but we cannot say that there is a reasonable probability that they did, and that the ballots have been changed. We hold, then, that these ballots are admissible, and upon the question whether they are the original ballots we have no difficulty in reaching a conclusion from an examination of the ballots themselves, and a comparison with the official returns, that they are the identical ballots cast, and, with two exceptions, their identity is proved by the official stamp of the precinct and the initials of the inspector. The exceptions create no suspicions, for one is marked Howser and the other Pepper. Further proof is found in the official canvass. The canvassing board found that 127 votes had been cast for the office of clerk, 25 of which they gave to Howser and 102 to Pepper, while the count of the ballots in court showed the same number marked for this office. Of these the stipulation concedes 23 belong to Howser and 95 belong to Pepper. The other nine are to be determined entirely from their markings. "When the statute provides that the ballots shall be kept in a certain way, and they are in the hands of the proper officer, it is presumed that he has done his duty; and the burden of proof is upon those assailing them to show that they might have been tampered with. On the other hand, when it is made to appear that the statutory provisions have not been complied with, this fact alone does not render the ballots inadmissible, but merely throws upon the person who asks the recount the burden of proof to show that they have not been tampered with; but this is a question of fact to be determined by jury or the Court trying the issue. 10 Am. & Eng. Enc. L. (2d Ed.) 831, and cases cited. In this precinct, and also Illinois precinct, the boxes were not technically sealed, but were merely locked. This, with the manner the boxes were kept, may be such a non-compliance with the statute as to cast the burden upon contestant to show that the ballots have not been tampered with. Conceding this, we think the obligation is met, and the evidence satisfies us that the ballots have not been changed. The disputed ballots are Exhibits 1 to 9, inclusive. The marking of ballots used at this election was governed by section 491 of the Revised Codes, as amended in 1897. This section provides the means by which the voter may declare his choice: First, he may, by his mark in the square at the head of the ticket under the party name, declare that he votes for all names printed in that column except such as are erased or pasted or written over; second, he may designate his choice of candidates for an office by placing a "cross or other mark" in the square opposite the name of the candidate for whom he desires to vote; third, he may write or paste a name on the ballot opposite the office to be voted for, and such name shall be counted, whether marked or not. Section 524, Rev. Codes, relating to the canvass of ballots, is as follows: "In the canvass of the votes, any ballot which is not endorsed as provided in this chapter by the official stamp and initials shall be void and shall not be counted, and any ballots or parts of

a ballot from which it is impossible to determine the elector's choice shall be void and shall not be counted; provided that when a ballot is sufficiently plain to gather therefrom a part of the voter's intention it shall be the duty of the judges of election to count such part." Two of the ballots here in dispute did not have the official stamp and initials, and should not have been counted by the precinct canvassers. This was conceded by counsel at the trial. The provision requiring the ballot to have the precinct stamp and the initials of the inspector was upheld by us at the present term as being both mandatory and constitutional, in *Miller* v. *Schallern,* 8 N. D. 395, 79 N. W. Rep. 865. These ballots are known as Nos. 6 and 7. One was marked for Howser, and the other for Pepper. Their rejection is a loss of one each.

On ballots 3 and 8 the voters have placed their cross entirely out of the squares provided as a place in which to indicate their choice. The only mark of any kind upon ballot No. 3 is a cross at the head of the republican column, about one-half an inch to the left of the square for voting the party ticket, and upon ballot 8 the elector placed a cross opposite the names of 14 different candidates in the independent-democrat column, but all to the right and outside of the squares. He then crossed over to the republican column, and made crosses opposite the names of 17 candidates of that party (one of which was that of Pepper) for other offices, but in every instance the cross was to the left and out side of the squares. The same principle will apply to both ballots. If canvassers may gather the intent of the voter from means other than the marking authorized by the statute, then the precinct officers were right in counting these two votes for Pepper. The authorities are to some extent in conflict upon this, but the rule which appeals to us as the safest guide is that requiring the voter to express his choice in the manner provided by the statute, and requiring canvassers and courts to disregard a ballot wherein the intention of the voter is not expressed by such means. This is the rule adhered to in South Dakota. That court, in *Vallier* v. *Brakke,* 64 N. W. Rep. 180, in passing upon a similar ballot, said: "There is much discussion on the argument and in the briefs of counsel as to the duty of judges of election and courts to carry out the intention of the voter. This is true to a certain extent; but, as the legislature has required the elector to express his choice by cerain well defined markings upon his ballot, his intention must be determined by these markings, and not by the uncertain and undefined ideas of the judges of election or by the courts as to his intention. The legislature has clearly and precisely defined the manner in which the elector may designate the candidate for whom he desires to vote, and has prescribed definite and fixed rules to govern the voter in designating such candidates. As before stated, the system is simple, and there is no difficulty in the elector's complying with the rules. In our view, it is neither the duty of judges of election nor the courts to fritter away the benefits of the system

by strained efforts to get at the intention of the voter in any manner other than by following the rules prescribed by the legislature." See, also, *Apple* v. *Barcroft,* 158 Ill. 649, 41 N. E. Rep. 1116; *McKittrick* v. *Pardee* (S. D.) 65 N. W. Rep. 23. The case of *Houston* v. *Steele* (Ky.) 34 S. W. 6, holds that a cross just outside the squares is sufficient, but the holding is not supported by either reason or authority. It follows from what we have said that ballots 3 and 8 cannot be counted.

On ballot No. 1 the voter made a cross in the square at the top of the independent-democrat column. He also made a cross in the squares opposite the names of 28 out of the 33 names of candidates in that column, but made no mark in the square opposite Howser's name. But he did make a cross in the square opposite Pepper's name in the republican column, and also made crosses in the squares opposite the names of two other republican candidates. In these markings the voter has used the method authorized by statute for declaring his choice, and we have no difficulty in determining that the intention of the voter was to vote for Pepper, and not for Howser. It is true that, if the names of no individual candidates were marked, the cross at the head of the party ticket would sufficiently indicate the general intention of the voter to vote for every candidate in that column whose name was not erased, pasted, or written over. But by marking opposite the names of particular candidates the voter unmistakably evinced a specific intention to vote for those particular candidates, and thus abandoned or nullified the effect of the mark at the head of the party column so far as the markings for individual candidates was inconsistent with the intention evinced by the mark at the head of the ticket This vote must be counted for Pepper. Our conclusion is supported by *Young* v. *Simpson* (Colo. Sup.) 42 Pac. Rep. 666, decided under a similar statute. See, also, *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 57. Other courts hold that one mark neutralizes the other, and should not be counted at all. *State* v. *Fransham* (Mont.) 48 Pac. Rep. 1; *Dickerman* v. *Gelsthorpe* (Mont.) 47 Pac. Rep. 999. Contestant claims this vote should be counted for him, and cites the decisions of South Dakota which hold, under a similar state of facts, that such a vote should be counted for every name on the party ticket which has not been erased, regardless of individual markings on other tickets; citing *Vallier* v. *Brakke* (S. D.) 64 N. W. Rep. 180; *McKittrick* v. *Pardee* (S. D.) 65 N. W. Rep. 23; *Church* v. *Walker* (S. D.) 72 N. W. Rep. 101. We do not consider these cases in point, or necessarily adverse to the views we have expressed. They are decided under a statute unlike that in this state, in this: that their statute not only declares the legal effect of the mark at the head of the party ticket, but further declares that it shall be counted for every candidate in the party column whose name is not erased. Their statute also provides that, "when a cross is placed to the left of any name on any other ticket the vote shall be counted for such other person; provided, the name of the candidate for the same

office on the ticket marked at the top by the voter is erased." The decisions relied upon are thus based upon a statute which declares the effect of such conflicting marks, and also how they shall be counted, removing from canvassers and courts the duty of gathering the intention of the voter from his markings. We have no statute which compels us to count a vote for a candidate for whom it was plainly not intended, but, on the other hand, effect is required to be given to the voter's choice when evinced in the manner provided by law.

Ballots 2, 5, and 9 are properly marked for Pepper. Contestant insists, however, that each of these ballots contain identification marks, and that such votes are, therefore, void, and should be thrown out. The marks complained of are crosses appearing upon the ballots which were not necessary to indicate the voter's choice. On Exhibit 2 there is a cross to the left of the square opposite the name of Fancher, and also a cross in the square. On Exhibit 5 there is a cross in the square at the head of the republican column, and a cross in all of the squares opposite the names of all the candidates in that column, and also in all the squares opposite all of the blank spaces for writing in names. Exhibit 9 is marked the same as Exhibit 5, except that it has no cross in the square at the head of the ticket. The objection to the counting of these votes is based upon section 559, Rev. Codes, which, for the purpose of maintaining the purity and secrecy of the ballot, prohibits the doing of numerous acts, among which is the use of distinguishing marks by the elector; the acts so prohibited being made punishable as a misdemeanor. The provision relating to distinguishing marks is as follows: "No elector shall place any mark upon his ballot by which it may afterwards be indentified as the one voted by him." The legislature has made such act unlawful, and to it has affixed a criminal penalty, but there is no provision of the statute which declares that a ballot so marked shall be void, and shall not be counted. On the contrary, section 524, before quoted, specifically declared what votes are void, and are not to be counted, namely, those which are not indorsed with the official stamp and initials, and those ballots or parts of ballots from which it is impossible to determine the elector's choice. Counsel for contestant cites *Sego* v. *Stoddard* (Ind. Sup.) 36 N. E. Rep. 204; *Zeis* v. *Passwater* (Ind. Sup.) 41 N. E. 796; *Bechtel* v. *Albin* (Ind. Sup.) 33 N. E. Rep. 967; *Dennis* v. *Caughlin* (Nev.) 41 Pac. Rep. 768; *Lauer* v. *Estes* (Cal.) 53 Pac. Rep. 262. All of these decisions are based upon statutes which not only prohibit the use of identifying marks, but further provide that ballots so marked shall not be counted, and are not, therefore, in point. *Whittam* v. *Zahorik* (Iowa) 59 N. W. Rep. 57, is under a statute very similar to our own, and upholds the rule that, "where the unauthorized marks are made deliberately, and may be used as a means of identifying the ballot, it should be rejected," but further holds that "it is not practicable

to adopt a rule in regard to identifying marks which would be applicable to all cases. It will not do to say that all ballots which bear marks not authorized by law should be rejected. All voters are not alike skillful in marking. Some are not accustomed to using pen or pencil, and may place some slight mark on the ballot inadvertently, or a cross may be clumsily retraced. It is evident that in such cases, and in others where the unauthorized mark is not of a character to be used readily for the purpose of identification, the ballots should be counted." The rule which appeals to us as the one best calculated to secure secrecy of the ballot without at the same time arbitrarily disfranchising voters whose ballots have superfluous marks placed there by themselves, innocently, or possibly corruptly placed upon the ballot by election officers for the purpose of destroying the vote, is that given by the Supreme Court of South Dakota in *Church* v. *Walker*, 74 N. W. Rep. 198. "The legislature never intended to disfranchise a legal voter, who, in substantially complying with the mandatory requirements of the law, has, without an evil purpose, but by accident or inadvertence, made a blot or mark upon his ballot, which in no manner tends to distinguish the same, or divulge the secret in his breast. This is undoubtedly the better rule, and one more in harmony with the spirit and intent of our ballot system. Unless, therefore, the ballot has been marked intentionally, and so marked as to enable third persons to determine, from an inspection of it, without other aid, that the same was deposited by a particular person, the judges of election should presume that the marking was inadverently done, and count the ballot. The object to be obtained by the Australian ballot law is to secure a secret ballot; that is, secret as to the judges of election and third persons. It would be difficult to lay down any rule which would prevent the voter himself from identifying his own ballot, and any attempt to do so would be futile." To the same effect is *State* v. *Russell* (Neb.) 51 N. W. Rep. 465. The ballots which are in question here do not present marks which themselves show that they were intended as distinguishing marks, and there is no evidence aliunde that they were in fact marked for the purpose of identification. It is therefore to be presumed that the marks were innocently made, and they were therefore properly counted as votes for Pepper.

Ballot Exhibit 4 has a single straight mark in the square at the top of the independent-democrat column, and no other mark upon it. This is objected to by contestee, because it is not marked with a cross. The ballot, as marked, complies with the statute. Section 491, Rev. Codes, as amended, only requires a mark in the square at the top of the party ticket, or "a cross or mark" in the squares opposite the names of candidates, to indicate the voter's choice. This ballot must be counted for Howser.

It is stipulated in the record that Pepper had 95 and Howser 23 undisputed votes in this precinct. Of the disputed ballots we give to Howser 1,—Exhibit 4. To Pepper we give 3 of the disputed ballots,—Exhibits 2, 5, and 9. The official canvass of the precinct

gave Howser 25, Pepper 102. The correct count of the precinct is 24 for Howser and 99 for Pepper, a loss of 1 for the former and 3 for the latter from the official count.

Recapitulating we find that Howser received 1 more vote in Illinois precinct than was given to him by the canvassers, and 1 less in Ora precinct. His correct vote, then, stands as canvassed. We find that Pepper received 3 less votes than counted for him by the canvassing board. The official canvass was 708 for Howser and 711 for Pepper. We find, then, that each candidate received 708 votes, and that by reason of the tie vote neither candidate was elected to the office of clerk of court, and neither is entitled to a certificate of election until such tie shall be removed upon the notice and in the manner provided by section 528 for determining the right to office between candidates who have an equal number of votes. The judgment of this Court is that J. A. Pepper received 708 votes for the office of clerk of court of Nelson county at the November, 1898, election; that E. A. Howser received the same number of votes for the same office; that such election did not result in the choice of either candidate for such office; and that the certificate of election issued by the board of canvassers to J. A. Pepper, reciting his election to such office, is void, and of no effect. The judgment of the District Court is reversed, and that court is directed to enter judgment in accordance herewith. All concur.

(79 N. W. Rep. 1018.)

C. H. ANHEIER *vs.* ELMER L. SIGNOR.

Opinion filed July 10, 1899.

Purchaser Pendente Lite—Intervention.

A party who purchases property from a defendant pendente lite may, with the permission of a court of equity and under section 5234, Rev. Codes, appear in the case at any stage of the procedings to defend his interests.

Assignment to Bank Cashier—Rights of Bank.

A land contract was assigned to "C. C. Schuyler, Cashier," the assignor knowing at the time that Schuyler was the cashier of a certain bank, and being also at the time indebted to the bank. The bank claimed that such assignment was made as security for the payment of such indebtedness, and in a proper action sought to foreclose the assignor's interest thereunder. Whether or not such assignment raised a presumption that it was made to the bank not decided, but *held* that, if such a presumption did arise, it was a rebuttable presumption, and was fully rebutted in this case.

Appeal from District Court, Cass County; *Pollock*, J.

Action by C. H. Anheier, receiver of the Citizens' National Bank of Fargo, against Elmer L. Signor. Judgment for plaintiff. Defendant appeals.

Reversed.

Pollock & Scott, and *Newman, Spalding & Stambaugh*, for appellants.

Benton, Lovell & Bradley, for respondent.

BARTHOLOMEW, C. J. We are first confronted in this case with a motion to dismiss this appeal. The plaintiff, Anheier, as receiver of the Citizens' National Bank of Fargo, brought suit against the defendant, Elmer L. Signor, upon the latter's promissory note for $10,000 given to said bank, and asked to foreclose the interest of said Signor in a land contract in which he was named as purchaser, and which covered a certain section of land in Cass county. The plaintiff claimed that said land contract had been assigned to said bank as security for the payment of the note. That the contract had been assigned to "C. C. Schuyler, Cashier," was admitted, and it was also admitted that at the time of the assignment Schuyler was the cashier of said bank, to defendant's knowledge. But it was the defendant's contention that the assignment was in fact made to Schuyler to secure an indebtedness owing by said defendant to said Schuyler, and that it never was given or intended to secure the indebtedness due the bank. The trial court resolved this issue against defendant, and there was a judgment and decree accordingly, from which defendant duly perfected an appeal. Now, however, respondent comes into this Court with a stipulation, signed by the parties of record, setting forth that the controversy had been settled, and consenting and asking that the appeal be dismissed. This is opposed by one G. Lee Clark, hitherto a stranger to the record. He bases his opposition upon the fact that, pending the litigation, the defendant, Signor, by quitclaim deed, transferred to Clark all his interest in the land, and that the settlement was made with full knowledge upon the part of plaintiff that such deed had been given, and of all the purposes for which it was given. Plaintiff, defendant, and Clark submit affidavits on the motion to dismiss. Certain things are undisputed. The deed to Clark was given, and that fact was well known to plaintiff when the settlement was made. Defendant, Signor, and his mother were largely involved. Everything that they had was incumbered, and actions were pending to foreclose these incumbrances, and they were in danger of losing their property. About the time this action was commenced Clark became interested in their affairs,—voluntarily, they say; he says at their request. It appears from the affidavits of all the parties that Clarke advised and counseled the Signors; that he virtually took charge of their litigation; that he looked up the testimony, employed the attorneys, advanced the funds necessary to meet the expenses of the litigation, or became responsible for such expenses; that he attended court at all times when the matters were being heard, and was active in promoting the interests of the Signors. This action was commenced April 12, 1898. The answer was served three days later, at which time an application for the appointment of a receiver was heard. Clark was present opposing the appoint-

ment, and it was denied. On April 23, 1898, the deed to Clark was executed. From these facts it is clear that Clark is bound by the decree in this case. He purchased the property pendente lite, with full knowledge of all the facts. The terms of that settlement between the parties to the record are not disclosed, further than that it appears that plaintiff had assigned and transferred his interests under the decree, thus leaving the decree in full force.

It further appears, both by affidavit and by the statement of his counsel in this court, that plaintiff has no further interest in the litigation, except, possibly, to the extent of the costs in this court. Under these facts, can Clark be heard to oppose this motion? We think he can. We make our decision no broader than the facts. When the settlement was made, both parties had full knowledge of the deed, and of just what Clark was claiming thereunder. If Clark speaks the truth, there was a tempting opportunity to defraud him. True, plaintiff might not benefit by the fraud, but he could not avoid knowing that he was enabling Signor to perpetrate the fraud and profit thereby. If plaintiff had made the settlement in ignorance of Clark's rights, or if he were to be damaged by a reversal of the decree, the matter might not appeal so strongly to a court of equity. Our statute (Rev. Codes, § 5234) declares that, in case of the death or disability of a party, the Court may, upon motion, allow the action to be continued by or against his representatives or successors in interest, but, in case of any other transfer of interest, the action shall be continued in the name of the original party, or the Court may allow the transferee to be substituted in the action. Clearly, this section applies to parties defendant as well as parties plaintiff. Under it Clark might have been made a party defendant to the action, had he so elected in the court below. We think it might be done in this court. See *Packard* v. *Wood,* 17 Abb. Prac. 318; *Emmet* v. *Bowers,* 23 How. Prac. 300. Without the aid of any such statute, it was said in *Mosier* v. *Lumber Co.,* 66 Ill. App. 630: "It would seem, therefore, that the Savings Union became a purchaser pendente lite from persons [defendants below] as to whom the decree was erroneous, and that it has a right, as such purchaser, to prosecute its writ of error. One who is a party or privy to the record or injured by the judgment, and who will, consequently, derive advantage from its reversal, may bring a writ of error to reverse the judgment,"—citing 2 Tidd, Prac. *1135; *Hill's Heirs* v. *Hill's Ex'rs.,* 6 Ala. 166; *Dupree* v. *Perry,* 18 Ala. 34. The same is held in *Mason* v. *Peck,* 7 J. J. Marsh, 300. There the purchaser brought the writ in the name of the original defendant. See, also, *Marr* v. *Hanna,* Id. 642. There are cases opposed to this principle (*Clarke* v. *Koehler,* 32 Tex. 679; *Stout* v. *Mercantile Co.,* 41 W. Va. 339, 23 S. E. Rep. 571); and Benn. Lis Pend. § 225, cites the Texas case with approval. But the principle which permits a purchaser pendente lite to prosecute an appeal from a judgment adverse to his interests is so strongly reinforced by our statute that we are clear that Clark

might have appealed in this case, and, defendant having taken the appeal, Clarke may be heard to oppose its dismissal when he claims such dismissal would be in bad faith as to him on the part of both parties. It is true that Signor seeks to avoid Clark's right by claiming that the conveyance to Clark was without consideration. Of course, we cannot determine the character of that conveyance upon affidavits. We only hold that on the affidavits Clark makes a case which entitles him to have a decree, which would forever bar his rights, set aside if erroneous, and thus enable him to test the validity of the conveyance in a proper action.

Upon the merits of the appeal, we are clear that the trial court wrongly decided the main issue of fact, which was whether the assignment was made as security to the bank or as security to Schuyler. The only competent evidence that we find in the case tending to support the position that it was made to the bank is the fact that it was made to "C. C. Schuyler, Cashier," and Signor, when he made it, knew that Schuyler was cashier of said Citizens' National Bank. The general rule that the addition of such words as "Agent," "Treasurer," President," etc., to the name, is simply descriptio personæ, is undisputed; but it is also undisputed that there is an exception, or partial exception, to the rule in the case of cashiers of banks. It is now held that, where negotiable paper is made to A. B., "Cashier," or any abbreviation of that word, it is, prima facie, at least, the property of the bank of which A. B. is cashier. *Bank of State of New York* v. *Muskingum Branch of Bank of State of Ohio*, 29 N. Y. 619; *Bank* v. *Hall*, 44 N. Y. 395. In such cases, where the instrument is indorsed by "A. B. Cashier," and delivered to a bona fide holder, the bank alone is liable on the indorsement. *Folger* v. *Chase*, 18 Pick. 67; *Farmers' & Mechanics' Bank of Michigan* v. *Troy City Bank*, 1 Doug. (Mich.) 473. This exception to the rule has been established because banks act only through agents, and the cashier is the chief financial agent of the bank, and usage has sanctioned the practice of permitting banks to do business in that manner. This being so, the enforcement of the general rule would often work injustice, and the exeception becomes a legal necessity. But we find no case where this exception has been applied to any transaction other than those relating to commercial paper. In Daniel, Neg. Inst. § 417, the exceptions are limited to such transactions. The reasons upon which it is based necessarily so confine it. Banks, particularly national banks, do not ordinarily deal in real estate. In the exceptional cases where they are permitted to do so, they do not take or convey real estate through an agent. Such matters require more formality, and, in cases of transfer by the bank, they require a corporate seal. A transfer to "A. B., Cashier," might, in equity, be enforced by the bank, upon a showing that it was intended as a transfer to the bank. The same might be done to whomsoever the transfer might be made, but it would require evidence to establish such intention. The most that could be claimed for the word

"Cashier" would be that it raised a presumption of fact. Indeed, that is its entire scope in commercial paper, except where the paper is in the hands of a bona fide indorsee. *Baldwin* v. *Bank*, 1 Wall. 234; *Bank* v. *French*, 21 Pick. 486; *Metcalf* v. *Williams*, 104 U. S. 93; *Southern Pac. Co.* v. *Von Schmidt Dredge Co.*, 118 Cal. 368, 50 Pac. Rep. 650. If, therefore, the Citizens' National Bank, or plaintiff as its receiver, were suing defendant upon his promissory note executed to "C. C. Schuyler, Cashier," it would still be open to the defendant to deny plaintiff's ownership of the note, and establish such fact by parol testimony. Certain it is that his rights were no less in this case. When we turn to the parol evidence, we find it quite satisfactory. The note to the bank, except a small portion thereof, represented the indebtedness of defendant's mother, for which defendant had received no consideration, and as to which he was in fact simply surety. This was well known to the bank. No agreement, understanding, or request had ever been made that defendant should secure said note. Defendant was indebted to Schuyler, and at the time such indebtedness was incurred defendant stated to Schuyler that he (defendant) owned 17 (meaning the section in question), and that Schuyler should lose nothing. The assignment was drawn up in the bank by Mr. Schuyler, and given to a notary public, with instructions to go to defendant's place, and get it signed and acknowledged. When it was presented to defendant, he asked what it was for. The notary replied that he did not know. Defendant stated that he would not sign it if it was for the bank, as he did not wish to get his property mixed up in his mother's affairs. The notary told him that Schuyler said that he (defendant) would know what it was for. Defendant replied that he would sign it for Schuyler, but would not sign it for the bank. Thereupon it was signed, and delivered to the notary. It is too clear for question that no interest was conveyed to the bank by such assignment, and the trial court was wrong in holding that the assignment was made to the bank. Let judgment be entered in the District Court setting aside the former decree, in so far as it orders a foreclosure of defendant's interest in said land, and declaring that plaintiff has no interest in, or lien upon, said land under or by virtue of the aforesaid assignment. Reversed. All concur.

(79 N. W. Rep. 983.)

MATILDA M. ROBERTS *vs.* FIRST NATIONAL BANK OF FARGO, *et al.*

Opinion filed August 9, 1899.

Obligation of Contract—Tax Sale.

A purchase at a tax sale is a contract. It is made upon the statutory assurances then given to the purchaser, and no subsequent statute can sweep away these assurances without impairing the obligations of the contract.

Tax Sale Certificate Not Conclusive Evidence of Jurisdictional Facts.

It is competent for the legislature to make a tax deed or tax sale certificate conclusive evidence of the due performance and regularity of all tax proceedings that are exclusively within legislative control, but not of such matters as are jurisdictional.

Statute of Limitations Does Not Run Against Jurisdictional Defects in Tax Proceeding.

Where there are jurisdictional defects in a tax proceeding, the recording of a tax deed issued pursuant to a sale for such tax will not set the statute of limitation running in favor of the party claiming under such deed, and it is immaterial whether such facts appear on the face of the deed or aliunde.

Sale of Part of Lot for Its Proportion of Tax—Void.

Where an entire lot in a city was assessed in solido for a lump sum, it was not competent for the treasurer to sell any portion of such lot for the tax on such portion. There was never any assessment of such portion, and such lack of assessment was a jurisdictional defect, and the legislature could not make the recitals in such deed conclusive evidence that there had been an assessment.

Conclusiveness of Certain Recitals in Tax Deed.

But it was competent for the legislature to make the recitals in the deed conclusive as to the description of the land upon which the tax was delinquent, and as to the land sold, and, where the descriptions were unambiguous, it was not proper to consider evidence on these points dehors the deed.

Assessments of Real Estate. Record.

It is competent for an assessor, in assessing real estate, to describe the same as the title appears of record. He is not required to search for unrecorded instruments, or to pass upon the validity of those on record, where they are not void on their face; and a city engineer, in making an assessment for paving purposes, may follow the same course, particularly where the assessment is in proportion to frontage, and not to valuation.

Member of Council Interested in Contract with City—Effect.

A statute declared that no member of the city council should be interested in any contract entered into by the city. *Held*, that a violation of the provision would not defeat a tax levied for the purpose of making payments under the contract.

Paving Assessment on Front Foot Plan—Legal.

Following Rolph v. City of Fargo, 7 N. D. 640, *held*, that a statute authorizing the assessment of a paving tax on the front-foot plan is not unconstitutional.

Recovery of Legal Taxes Paid by Owner of Tax Title When Tax Deed Adjudged Void.

Where a sale of land for taxes is set aside as void, and the purchaser has paid subsequent taxes on the land, he is not entitled to a judgment against the fee owner for the amounts thus paid. His remedy to recover for valid taxes paid rests with the legislature, and under section 88, c. 126, Laws 1897, he has his remedy against the county, and the taxes stand as a lien upon the land. Chapter 132, Laws 1890, required real property to be assessed in the name of the owner, if known, and that real estate separately owned should be separately described. These requirements were mandatory and jurisdictional. Where, prior to the preparation of the real estate tax list a portion of a lot was transferred, and the conveyance duly placed on record, a subsequent assessment of the entire lot at a lump sum against the original owner was unauthorized and void; nor could the auditor in such case divide the valuation, and transfer portions thereof to the respective parts of the lot, under the provisions of section 92 of said chapter 132.

Wallin, J., dissenting in part.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Matilda Roberts against the First National Bank of Fargo and W. D. Hodgson to determine adverse claims to lot 20, block "G," of Charles Roberts' Addition to the City of Fargo. The defendants claim under certain tax sales and tax deeds. The First National Bank of Fargo claimed to own the south half of lot 20 under a sale based on the taxes for the year 1888, and the respondent, Hodgson, claimed the north half of said lot 20 under tax deeds based on sales for the years 1890, 1892 and 1893. The deed to the bank was recorded more than three years before the commencement of this action. The District Court held, that under said tax deeds the defendant bank was the owner of the south half of said lot 20, and that the defendant Hodgson was the owner of the north half thereof, and that the title of each therein should be quieted and confirmed. Plaintiff appealed.

Modified.

J. E. Robinson, for appellant.

The tax sales and all the assessments of the north half and the south half of lot 20, block "G," are void because said lot has no north half and no south half. It is not in the form of a parallelogram. It is bound on the north by a straight line and on the south by an irregular curved line, following the bed of a ravine, and it has never been subdivided. The sale under which the bank claims title was void for the reason that it was made for an excessive amount. In 1888 the total interest and penalty was $17.68 as charged against lot 20. The sale was for $19.06 as shown by the recitals in the deeds. A tax sale is void when made for a sum in excess of the legal taxes and charges. *Baker* v. *Supervisors*, 39 Wis. 447; *Milledge* v. *Coleman*, 47 Wis. 184; *Kimball* v. *Ballard*, 19 Wis. 634; *Barden* v. *Supervisors*, 33 Wis. 447; *Harper* v. *Rowe*, 53 Cal. 233; *Wills* v. *Austin*, 53 Cal. 152; *Treadwell* v.

Patterson, 51 Cal. 637; *Case* v. *Dean,* 16 Mich. 12; *Riverside* v. *Howell,* 113 Ill. 259; *Kemper* v. *McClelland,* 19 Ohio 308; *Gage* v. *Pumpelly,* 115 U. S. 454. The lot was assessed as one entire tract and valued at one lump sum, and there was no authority to subdivide the lot and to sell it in fractional parts. *O'Neil* v. *Tyler,* 3 N. D. 47, 53 N. W. Rep. 434. A tax deed cannot be made conclusive evidence of any essential requisite of the exercise of the taxing power, such as the assessment, levy, and sale. *McCready* v. *Sexton,* 29 Ia. 356, 385; Cooley on Taxation (2d Ed.) 555; Cooley's Cons. Lim. 447 and 449; *Groesbeck* v. *Seeley,* 13 Mich. 329, 342; *Baker* v. *Kelley,* 11 Minn. 480; Blackwell on Tax Titles, Chap. 39, Secs. 895 and 944; *Dingy* v. *Paxton,* 60 Miss. 1038; *Baldwin* v. *Merriam,* 16 Neb. 199; *Conway* v. *Cable,* 37 Ill. 82; *Waln* v. *Shearman,* 8 Serg. & R. 357; *Kipp* v. *Johnson,* 31 Minn. 360; *Farar* v. *Clark,* 85 Ind. 449; *Case* v. *Dean,* 16 Mich. 12; *Quinlan* v. *Rogers,* 12 Mich. 168. The provision of the Comp. Laws (Sec. 1640) that no action shall be commenced by the former owner of lands to recover the possession of land which has been sold and conveyed for the non-payment of taxes unless the action is commenced within three years after the recording of the deed, would not apply as against tax deeds void upon their face. Section 1640, Compiled Laws, was repealed before this action was commenced, and after the expiration of three years from the record of one tax deed. This section (1640) of the Comp. Laws, merely took away or suspended certain remedies or forms of action but left the property rights of the parties unaffected. *Kipp* v. *Johnson,* 31 Minn. 360. This is a statutory proceeding for the determination of adverse claims. *Walton* v. *Perkins,* 28 Minn. 413. All that the complaint need allege is that defendant claims some estate or interest in or lien upon the land without showing that the claim is invalid or that the defendant does the plaintiff any wrong in making it. *Steele* v. *Fish,* 2 Minn. 129; *Hamilton* v. *Batlin,* 8 Minn. 359. The plaintiff having proved his possession or title, the burden shifts to defendant to prove his adverse claim. *Wilder* v. *St. Paul,* 12 Minn. 116. The object of the action is to force one claiming an adverse interest or lien to establish or abandon his claim. *Meighen* v. *Strong,* 6 Minn. 111. With respect to the claim of the defendant, the position of the parties is the reverse of that occupied by the parties in an ordinary action. The defendant becomes practically the plaintiff and takes the affirmative in pleading and proof. The action under the statute is to compel the defendant to tender issues unless he chooses to abandon them. *Meighen* v. *Strong,* 6 Minn. 111; *Eastman* v. *Linn,* 20 Minn. 387; *Bausman* v. *Faue,* 45 Minn. 412. The primary question in the case is not on the right of the plaintiff to maintain her suit, but on the right of the defendants to maintain it. The Statute of Limitations plead against appellant was repealed by the Revised Code before the respondent Hodgson obtained his tax deeds, while said statute pertains only to the remedy and rules of evidence in which no one has a vested right. Cooley's Const. Lim. (6th Ed.) 450.

Newman, Spalding & Stambaugh, for respondent.

The defendant bank claims the south half of lot 20 under a tax deed issued on a sale for delinquent taxes made in 1889, which deed was issued to O. P. Smith and was recorded February 8, 1892. Smith quit-claimed to the bank and this deed was recorded May 15, 1895. Plaintiff's title can not be quieted unless this deed is set aside. Her action, therefore, is one to avoid a tax deed. *Mead* v. *Nelson,* 52 Wis. 402. The tax sale was made under Sec. 1622, Comp. Laws. It is in the form provided by statute, executed under Sec. 7, Chap. 100, Laws 1891. This action is barred under Sec. 1640, Comp. Laws, under which the sale to Smith was made and the title under the tax deed became absolute three years after the record of such deed. *Pillow* v. *Roberts,* 13 How. U. S. 472; *Leffingwell* v. *Warren,* 2 Black U. S. 599; *Colter* v. *Stafford,* 48 Fed. Rep. 266; *Bardon* v. *Land Improvement Co.,* 157 U. S. 327; *Wickoff* v. *Miller,* 19 So. Rep. 478; *Woolfork* v. *Buckner* (Ark.) 29 S. W. Rep. 372; *Martin* v. *Garrett,* (Kas.) 30 Pac. Rep. 168; *Doudna* v. *Harlan,* (Kas.) 25 Pac. Rep. 883; *Maxson* v. *Huston,* 22 Kas. 448; *Smith* v. *Cleveland,* 17 Wis. 573; *Lord* v. *Milwaukee,* 15 Fed. Cases, 888, No. 8507; *Knox* v. *Cleveland,* 13 Wis. 274; *Dalrymple* v. *Milwaukee Ry. Co.,* 10 N. W. Rep. 141; *Mansean* v. *Edwards,* 10 N. W. Rep. 554; *Hiles* v. *La Flesch,* 18 N. W. Rep. 435; *Hotson* v. *Wetherby* (Wis.) 60 N. W. Rep. 423; *Dupen* v. *Wetherby* (Wis.) 48 N. W. Rep. 378; *Oconto Co.* v. *Jerrard* (Wis.) 50 N. W. Rep. 591; *Sherry* v. *Gillmore,* (Wis.) 17 N. W. Rep. 252; *Hazeltine* v. *Simpson* (Wis.) 17 N. W. Rep. 332; *Sprecher* v. *Wakeley,* 11 Wis. 451; *Edwards* v. *Sims* (Kas.) 19 Pac. Rep. 710; *Bronson* v. *St. Croix Lumber Co.,* 46 N. W. Rep. 570; *Thompson* v. *Brackinridge,* 14 Serg. & R. 346; *Frick* v. *Sterrett,* 4 Watts & Serg. 269; *Burd's Ex'rs,* 22 Pa. St. 219; *Fager* v. *Campbell,* 5 Watts 288; *Stewart* v. *Shoenfelt,* 13 Serg. & R. 360; *Strauch* v. *Shoemaker,* 1 Watts & Serg. 166; *Meldahl* v. *Dobbin,* 77 N. W. Rep. (N. D.) 280; *Jeffrey* v. *Brockaw,* 35 Ia. 505; *Thomas* v. *Stickle,* 32 Ia. 71; *Pierce* v. *Weare,* 41 Ia. 378; *Joslyn* v. *Rockwell,* 128 N. Y. 334; *People* v. *Turner,* 117 N. Y. 227; *Ensign* v. *Barse,* 107 N. Y. 329; *Ware* v. *Little,* 35 Ia. 234; *Sibley* v. *Bullis,* 40 Ia. 429; *Martin* v. *Cole,* 38 Ia. 141; *McCready* v. *Sexton,* 29 Ia. 356; *Clark* v. *Thompson,* 37 Ia. 536. Section 1640, Comp. Laws, is not repealed by the statute of 1890. The retroactive provisions contained in that statute are not indicated in its title, which only refers to the future assessment, levy, and collection of taxes. The title gives no indication of any change of the statute of limitations affecting prior actions. As to those it is unconstitutional. *Divet* v. *Richland County,* 8 N. D. 65, 76 N. W. Rep. 993. The provisions of Chapter 132, Laws 1890, are entirely prospective in their operation. *Wells County* v. *McHenry, et al.,* 7 N. D. 246, 74 N. W. Rep. 241. This section of the statute was repealed by the Revised Codes which went into effect January 1, 1896. The title under the tax deed became absolute prior to the repeal of the statute and could not be disturbed

by the repeal. The statute affects the title to the land and not simply the remedy. *Way* v. *Hobton,* 26 Atl. Rep. 784; *Bird* v. *Sellers,* 21 S. W. Rep. 91; *Cole* v. *Coon,* 12 So. Rep. 849; *Smith* v. *Cleveland,* 17 Wis. 573; *Knox* v. *Cleveland,* 13 Wis. 274; *Sprecker* v. *Wakeley,* 11 Wis. 451. Statutes of limitations with respect to real estate are statutes of repose and favored by the courts. *Lewis* v. *Marshall,* 5 Pet. 478; *Leffingwell* v. *Warren,* 2 Black 606; *Cheatham* v. *Young,* 18 S. E. Rep. 93; *Manufacturing Co.* v. *Brooks,* 11 S. E. Rep. 460. The respondent bank offered evidence for the purpose of showing the amount of tax charged against the land and paid by Smith. This was no waiver. *Bardon* v. *Implement Co.,* 157 U. S. 327; *Edwards* v. *Sims,* 19 Pac. Rep. 710. The object of this proof was to afford a basis for judgment under section 1643, Comp. Laws. The possession of unoccupied land follows the tax deed. *Gunnison* v. *Hoehne,* 18 Wis. 283; *Dean* v. *Early,* 15 Wis. 109; *Whitney* v. *Marshall,* 17 Wis. 180; *Knox* v. *Cleveland,* 13 Wis. 274; *Lawrence* v. *Kenney,* 32 Wis. 281; *Bardon* v. *Implement Co.,* 157 U. S. 327. Were this an action to recover possession appellant would be barred by the statute. *Doudna* v. *Harlan,* 25 Pac. Rep. 888; *Martin* v. *Garrett,* 30 Pac. Rep. 168; *Hiles* v. *La Flesch,* 18 N. W. Rep. 435; *Oconto* v. *Jerrard,* 50 N. W. Rep. 591; *Sherry* v. *Gilmore,* 17 N. W. Rep. 252; *Hazeltine* v. *Simpson,* 17 N. W. Rep. 332; *Edwards* v. *Sims,* 19 Pac. Rep. 710; *Coulter* v. *Stafford,* 48 Fed. Rep. 266. The respondent Hodgson claims title to the north half of the lot by virtue of tax deeds on sales of 1890, 1802, 1803 and 1894. The last three deeds were made for sales under the revenue law, Chapter 132, Laws 1890. The deeds were under the provisions of section 92, Chapter 126, Laws 1897. All other statutes with reference to the execution and delivery of deeds upon sales made prior to the year 1897 are repealed by Section 110 of Chapter 126, Laws 1897, leaving Section 92 the only authority for the issuance of deeds upon such sales. The question arising upon this branch of the case is as to the validity of Section 92, Chapter 126, Laws 1897, under the constitution of the state and under the constitution of the United States. The legislature has power to foreclose inquiry and make the sale certificate or deed absolute, except as to judicial questions. Judicial questions are held to be: First, the taxability of land; second, the non-payment of taxes; third, the non-redemption of the land. *De Traville* v. *Smalls,* 98 U. S. 522; *Smith* v. *Cleveland,* 17 Wis. 573; *Bardon* v. *Implement Co.,* 157 U. S. 327; *Knox* v. *Cleveland,* 13 Wis. 274; *Oconto* v. *Jerrard,* 50 N. W. Rep. 594; *Lord* v. *Railway Co.,* 15 Fed. Cases, 888; *Doudna* v. *Harlan,* 25 Pac. Rep. 883; *Edwards* v. *Sims,* 19 Pac. Rep. 710; *Mason* v. *Heuston,* 22 Kas. 643; *Ware* v. *Little,* 35 Ia. 234. The legislature may make the tax deed conclusive evidence of compliance with every requirement the legislature might originally, in the exercise of its discretion, have dispensed with. Black on Tax Titles, Sec. 452; Cooley on Taxation, 229; *De Traville* v. *Smalls,* 98 U. S. 525;

Ensign v. *Barse*, 107 N. Y. 337. Hodgson's deed can only be set aside upon proof of one or more of the four facts permitted by Sec. 72, Ch. 132, Laws 1890, provided all other judicial facts exist. *Shattuck* v. *Smith*, 6 N. D. 73; *Spalding* v. *O'Connor*, 77 N. W. Rep. 323. Under this section all inquiry as to other facts is foreclosed and the state guarantees to the purchaser that his purchase shall not be assailed except for one of the reasons stated. The provision becomes a part of the contract of sale and can not be changed or repealed by the legislature. *Doudna* v. *Harlan*, 25 Pac. Rep. 883; *Martin* v. *Garrett*, 30 Pac. Rep. 168; *Hiles* v. *La Flesch*, 18 N. W. Rep. 435; *Oconto* v. *Jerrard*, 50 N. W. Rep. 594; *Sherry* v. *Gilmore*, 17 N. W. Rep. 252; *Hazeltine* v. *Simpson*, 17 N. W. Rep. 332. This is an equity case and governed by the principles announced in *Farrington* v. *Investment Co.*, 1 N. D. 102; *Shattuck* v. *Smith*, 6 N. D. 61.

BARTHOLOMEW, C. J. Plaintiff brought this action under section 5904, Rev. Codes, to determine adverse claims to lot 20, block G, of Charles Roberts' addition to Fargo. The action was begun August 25, 1898. Plaintiff avers in her complaint that she is the owner in fee of said lot; that the defendants wrongfully claim some title or interest therein under certain tax sales and tax deeds. The defendants answered separately. The defendant bank alleged ownership in fee in itself of the south half of said lot by virtue of a tax deed issued upon a sale of the same for the taxes of 1888. It also set up a lien by virtue of a purchase from the city for a paving tax levied thereon. The defendant Hodgson claimed title to the north half of said lot by virtue of tax deeds on sales thereof for the taxes of 1889, 1890, 1892, and 1893. There was a reply setting forth matters intended to avoid the tax deeds. The trial court sustained those deeds as to each defendant, and the plaintiff appeals and demands a retrial of all the issues in this Court. As the defenses are entirely separate, we shall first consider that made by the bank.

In 1889 one O. P. Smith purchased the south half of said lot 20 at the regular tax sale for the delinquent taxes of 1888, and received the usual certificate of sale. A tax deed was regularly issued to him upon said certificate on January 15, 1892, and the same was duly recorded on February 8, 1892. On May 13, 1895, O. P. Smith, by quit-claim deed, conveyed the property to the defendant bank. It is urged by the bank that plaintiff cannot now avoid the tax deed issued to Smith. At the time of the sale in 1889, section 1640, Comp. Laws, was in force. It reads: "No action shall be commenced by the former owner or owners of lands, or by any person claiming under him or them, to recover possession of land which has been sold and conveyed by deed for non-payment of taxes, or to avoid such deed, unless such action shall be commenced within three years after the recording of such deed." This section was re-enacted verbatim by section 1269, Rev. Codes 1895, but was properly, and in express terms, repealed by section 110, Ch. 126, Laws 1897,

which went into effect March 8th of that year. This action was commenced thereafter. It will be noted that the three years limitation fixed by the former statute had fully run before that statute was repealed and before this action was brought. Plaintiff concedes that if, at the time of the repeal of that act, the defendant bank had any vested rights of property in the land claimed by it, such rights would not be affected by the repeal. But it is urged by appellant that that statute of limitations never began to run in favor of said deed by reason of certain jurisdictional defects. Section 1639, Comp. Laws, which was in force when the tax sale was made upon which the tax deed rests, reads as follows: "Such deed shall be executed by the county treasurer under his hand, and the execution thereof shall be attested by the county clerk with the county seal, and such deed shall be conclusive evidence of the truth of all the facts therein recited, and prima facie evidence of the regularity of all the proceedings from the valuation of the land by the assessor up to the execution of the deed." This statute entered into the contract of purchase, and became a part thereof. In Cooley, Tax'n, 545, it is said: "Now, the purchase at a tax sale is clearly a contract. It is made under the law as it then exists, and upon the terms prescribed by the law. No subsequent statute can import new terms into the contract, or add to those before expressed. If it could be changed in one particular, it could be in all; if subject to legislative control at all, it is wholly at the legislative mercy." See *Morgan* v. *Commissioners*, 27 Kan. 89; *Forqueran* v. *Donnally*, 7 W. Va. 114; *Merrill* v. *Dearing*, 32 Minn. 479, 21 N. W. Rep. 721; *Robinson* v. *Howe*, 13 Wis. 341. The defendant bank is, therefore, entitled to the full benefit of that provision so far as it is competent legislation, but it is likewise bound by it if it operate to its disadvantage. In the tax deed introduced by said defendant it is recited, in effect, that defendant's grantor, O. P. Smith, purchased the south half of said lot 20 at the tax sale in 1889 for the delinquent taxes thereon for the year 1888. It is not said that he purchased said south half for the delinquent taxes upon the entire lot, but upon the south half of the lot. Such being the recital in the deed, it was competent for the legislature to declare the same conclusive as to the fact. Appellant introduced in evidence the tax list for the year 1888, and that shows that the entire lot 20 in said block G was assessed to the appellant in that year at one lump sum, and it is undisputed that she was at that time the owner of the entire lot. No valuation had ever been placed upon the south half of the lot by the assessor. In other words, it had never been assessed, and there could be no delinquent tax against such tract. No officer had any authority to subdivide lot 20, and say that any portion of the tax thereon, or even all the tax thereon should be charged to a specific portion of the lot. In *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 434, this Court held that, where two lots belonging to one person had been assessed at a lump sum, the treasurer could not sell one lot for a moiety of the tax arising on such lump valuation. The principle of

that case is exactly applicable here, and it is well fortified in the books. See authorities cited on page 52. We cannot escape the conclusion, on the undisputed testimony, that the south half of lot 20 was not assessed for taxation in the year 1888. But the tax deed under which the defendant bank claims recites that said tract "had been duly assessed," and the statute already quoted declares that the "deed shall be conclusive evidence of the truth of all the facts therein recited." Could the legislature thus foreclose that question as against the appellant? We think not. An assessment is in the broadest sense a jurisdictional requirement. It is the groundwork of all subsequent tax proceedings. Without it, no taxing officer has jurisdiction to proceed further. The legislature cannot dispense with it, or fix its basis. These matters are grounded in the constitution. Its absence is not a mere irregularity. It is not a measure that the legislature can control, excuse, or cure. As to such matters the legislature may make the tax deed conclusive evidence of their performance, but it may not make it conclusive as to any jurisdictional matter. *Raley* v. *Guinn*, 76 Mo. 263; *Abbott* v. *Lindenbower*, 42 Mo. 162; *Griffin* v. *Dogan*, 48 Miss. 11; *Bell* v. *Coats*, 54 Miss. 539; *Virden* v. *Bowers*, 55 Miss. 1; *Martin* v. *Cole*, 38 Ia. 141; *Immegart* v. *Gorgas*, 41 Ia. 439; *In re Douglass* (La.) 6 So. Rep. 675; *Callanan* v. *Hurley*, 93 U. S. 387; *Morrill* v. *Douglass*, 17 Kan. 291; *Ensign* v. *Barse*, 107 N. Y. 329, 14 N. E. Rep. 400, and 15 N. E. Rep. 401; *Bannon* v. *Barnes*, 39 Fed. Rep. 892; Black, Tax Titles, § 432; Cooley, Const. Lim. (5th Ed.) top page 458; *Smith* v. *Cleveland*, 17 Wis. 565; *Brown* v. *Slauson*, 23 Wis. 245; *Railroad Co.* v. *Snyder*, 18 Ohio St. 406.

It being regarded as established that the south half of said lot 20 was not assessed for taxation for the year 1888, could the tax deed issued upon a sale of said tract for the taxes of said year set the statute of limitations running? There may not be entire uniformity in the decisions upon this point. We think on principle the interrogatory should be answered in the negative. There being no assessment, the treasurer was without jurisdiction to make a sale or issue a deed. As to such acts he was a private citizen. The deed conveyed nothing in fact. It was void. The decided weight of authority is in favor of this position. *Nichols* v. *McGlathery*, 43 Ia. 189; *Burke* v. *Cutler*, 78 Ia. 299, 43 N. W. Rep. 204; *Townsend* v. *Edwards* (Fla.) 6 South. Rep. 212; *Sloan* v. *Sloan*, (Fla.) 5 South. Rep. 603; *Hurd* v. *Brisner*, 3 Wash. St. 1, 28 Pac. Rep. 371; *Davenport* v. *Knox*, 34 La. Ann. 407; *Bird* v. *Benlisa*, 142 U. S. 664, 12 Sup. Ct. 323; *Smith* v. *Sherry*, 54 Wis. 115, 11 N. W. Rep. 465; *Wadleigh* v. *Bank*, 58 Wis. 546, 17 N. W. Rep. 314; *Gould* v. *Sullivan*, 84 Wis. 659, 54 N. W. Rep. 1013; *Case* v. *Albee*, 28 Ia. 277; *Powers* v. *Fuller*, 30 Ia. 476; *Wilson* v. *Crafts*, 56 Ia. 450, 9 N. W. 333; *Sheehy* v. *Hinds*, 27 Minn. 259, 6 N. W. Rep. 781; Black, Tax Titles, § 498. An examination of the cases cited will disclose that, while they do not all relate to want of assessment, they do relate to some matter

that was held jurisdictional to the right to issue a tax deed, and in each case it was held that, where such defect existed, the statute of limitations was not set in motion. The jurisdictional defects will be found to include the non-taxability of the property, the absence of any assessment, the absence of any levy, the fact of payment, the absence of any tax sale, and the fact of lawful redemption. To these must be added all cases where the tax deed is void upon its face: *Hegar* v. *De Groat*, 3 N. D. 354, 56 N. W. Rep. 150, and cases cited. It was not the intention of this Court to decide anything contrary to the views above expressed in *Meldahl* v. *Dobbin*, 8 N. D. 115, 77 N. W. Rep. 280. The trial court found that the sale of this south half of said lot was in fact made for the taxes upon the entire lot, and there are many circumstances dehors the deed which lead us to think that such was the fact. In such case the sale was valid, as we hold, notwithstanding the configuration of the lot, that it could properly be divided into south half and north half. But we deem the recital in the deed conclusive upon the respondent bank of the fact that the sale was made for the taxes assessed against and delinquent upon the south half of said lot. Still we are unable to perceive how the other holding could aid respondent. If it be true that the sale was for the taxes upon the entire lot, yet no deed has ever issued pursuant to such sale. The deed that did issue did not conform to any such sale, and cannot avail respondent as a defense in this action.

The respondent bank also pleads a purchase of said south half under a sale thereof by the City of Fargo for a paving tax assessed in 1896, the sale being made in March, 1897, and a certificate in due form issued to the respondent bank. Section 2300, Rev. Codes, makes such certificate presumptive evidence of the regularity of all prior proceedings. The respondent bank introduced such certificate. Appellant makes three objections to this certificate. First, she claims—and introduced evidence on the point—that one of the city aldermen was interested in the paving contract under which this tax was assessed. Granting this to be true, it probably subjected such alderman to removal, under section 2136, Id.; but counsel cites no authority, nor do we know of any, holding that such fact invalidated the tax. We think it has no such effect. Counsel also claims that this paving law, under which assessments were made upon the front-foot plan, is unconstitutional, as depriving a person of his property without due process of law. In *Rolph* v. *City of Fargo*, 7 N. D. 640, 76 N. W. Rep. 242, this Court recently and upon full investigation held the contrary. Lastly, counsel urges certain irregularities, but he introduced no evidence whatever relating thereto to overcome the presumption of regularity raised by the statute by the issuance of the tax sale certificate. It is true that the fee title to the entire lot was in appellant, and the pavement assessment was against the south half of the lot. Ordinarily, a single lot, owned by one party, should be assessed as a unit. Black, Tax Titles, § 102 et seq. There was, however, at this time, a tax

deed on record conveying the south half of said lot to the grantor of the respondent bank, and an assessor is always permitted to follow the record title in making assessments, and is not required to pass upon the sufficiency or legality of such title. Id. 107. We may remark, also, that this rule requiring each lot to be assessed as a unit applies to assessments by valuation, and none of the reasons upon which it is based would apply to an assessment made directly against the tract on the basis of its frontage, without regard to valuation. We do not think this sale for pavement tax has been in any manner impeached. But this certificate did not vest title to the tract in respondent bank. It gave simply a lien,—a lien, it is true, superior to all liens that had been or might be placed thereon by the owner, but yet only a lien. Cooley, Tax'n, 511; Desty, Tax'n, 853; Black, Tax Titles, § 422. It is such a lien, however, as may be litigated in this action under the express terms of section 79, Ch. 126, Laws 1897, under which this action was brought. It follows from these views that appellant holds the legal title to said south half of said lot subject to the claim of the respondent bank under and by virtue of the sale for the delinquent pavement tax.

Nor do we think the respondent bank entitled to any judgment against appellant for any taxes paid by O. P. Smith or by said respondent upon said south half after the purchase thereof at tax sale in 1889. Smith has assigned all his claims therefor to respondent. Under sections 1640, 1643, Comp. Laws 1887, and section 1273, Rev. Codes 1895, such judgments were permissible under certain circumstances. We discussed these provisions somewhat in *Power* v. *Larabee*, 2 N. D. 141, 151, 49 N. W. Rep. 724, and *O'Neil* v. *Tyler*, 3 N. D. 47, 53 N. W. Rep. 434. But, in so far as those statutes related to the remedy of the party who had paid subsequent taxes, they were entirely within legislative control, and have been superseded by section 88, Laws 1897. Under that section, where a sale of lands for taxes is adjudged to be void, but subsequent taxes have been paid by the purchaser, such party is in all cases relegated to his remedy against the county, and the taxes stand as a lien against the land, and the land must be sold therefor at the next ensuing tax sale.

We now proceed to consider the defense made by the respondent Hodgson. He claims title to the north half of said lot by virtue of several tax deeds. All the tax sales under which he claims, were made under the revenue law of 1890. In each of the years wherein it is claimed the taxes were delinquent said lot 20 had been assessed by the assessor as an entirety, and as the property of this appellant, while respondent Hodgson's tax deeds are each for the north half of said lot, and based upon a sale of the north half for the taxes thereon. His first deed is dated June 16, 1895, and is based upon the sale in 1890 for the delinquent taxes of 1889. This deed is concededly void, and need not be further noticed. His second deed

is dated January 20, 1899, and is based upon the tax sale of 1891 for the delinquent taxes of 1890. While this deed purports to convey the north half of said lot, the certificate of sale upon which it was based, and which was introduced in evidence, shows a sale in 1891 of the undivided half of said lot for the taxes delinquent thereon for 1890. Such a certificate cannot support a deed for the north half of the lot. No authorities are needed upon such a proposition. It does not appear that the said north half was sold in 1892 for the taxes of 1891. But respondent Hodgson holds two other tax deeds thereon, each dated January 20, 1899: one based upon a sale in 1893 for the delinquent taxes of 1892, and the other based upon a sale in 1894 for the delinquent taxes of 1893. As already stated, for each of said years the said lot 20 was assessed as an entirety, and as the property of appellant. The statute then in force (sections 6, 32, Ch. 132, Laws 1890) required real estate to be assessed in even numbered years and in the months of May and June, consequently this assessment must have been made in May and June, 1892. Said section 32 required the assessor to assess "each tract or lot of real property listed for taxation," while section 29 required the auditor to furnish the proper assessment books at the expense of the county, and to "make out in the real property assessment book complete lists of all lands or lots subject to taxation, showing the names of owners if to him known, and, if unknown, so state it, the number of acres, and the lots or parts of lots or blocks included in each description of property." This book was to be ready for the assessor on the last Saturday in March preceding the assessment. It is clear that the statute required the land to be assessed in the name of the owner, if known. Such statutes are mandatory, and a compliance therewith is jurisdictional. Black, Tax Titles, § 105. It is also apparent that it required each tract separately owned to be separately described and assessed. This, too, is imperative. Id. §§ 102, 112, and authorities cited. As we have seen, in February preceding this assesment and preceding the preparation of the real estate list a tax deed to the south half of said lot in favor of O. P. Smith was duly recorded. If we assume —which is probably correct—that in making up this real estate list the auditor was without authority to pass upon the validity or invalidity of the deed to Smith, and that it was his duty to enter separately each description of land owned by separate owners as the same appeared of record, then it is clear that he did not perform that duty, and the assessor was never authorized to assess, and never did assess, the north half of said lot. True, section 92 of said chapter 132 provides for certain cases where an entire valuation may be divided, and portions thereof transferred to different parts of the tract originally assessed in solido. But, as we construe the section, it applies only to cases where, after the tax list has been delivered to the assessor, and before the tax becomes a lien, a portion of an entire tract is transferred. The parties in interest may then appear before the auditor, and agree upon the portion of the valuation

that may be transferred to the portions of the tract owned by each, or, if they fail to agree, the auditor may make such transfer as may be just. But that section does not apply where the separate ownership of the separate parties appeared of record when the list was prepared. But we have held the deed to Smith void. If we assume that the auditor, from the records of his office, reached the same conclusion, and properly listed the entire lot as the property of the appellant, still respondent Hodgson's deed must fall for the same reason that compelled us to hold the deed to Smith to be void. They recite a sale of the north half of said lot for the taxes delinquent upon such half, while in fact such half had never been assessed as an entity, and there could be no delinquent tax against it. In no view of the case can we support these deeds. The District Court is directed to enter a decree in this case canceling and annulling the tax deeds hereinbefore mentioned, and confirming the title of appellant to the south half of said lot 20 as against the respondent bank, save and except as to the claim of said respondent under the certificate of sale for delinquent pavement tax as hereinbefore set forth, and confirming the title of appellant to the north half of said lot absolutely as against the claims of respondent Hodgson under the tax deeds heretofore mentioned. Appellant will recover no costs against the respondent bank, nor will said respondent recover any costs. Appellant will recover costs against respondent Hodgson.

Modified.

YOUNG, J., concurs.

WALLIN, J. I concur in the conclusion and in the reasoning of the Chief Justice, as stated in the opinion of the Court, except that, in my opinion, the language of section 92, Ch. 132, Laws 1890, has no application to a case of an involuntary transfer of title to real estate by a tax proceeding. In my judgment, section 92 has reference only to such transfers as are made by agreement of parties.

Rehearing denied September 11, 1899.

(79 N. W. Rep. 1049.)

GEORGE D. LAY *vs.* LEWIS EMERY, JR.

Opinion filed July 1, 1899.

Partnership Settlement—Conclusiveness.

Partners who have made a settlement of their accounts, in whole or in part, and reduced it to writing, are concluded thereby, and the courts will not disregard it, when it is free from fraud, duress, misrepresentation or concealment, or mistake of fact.

Good Faith Between Partners.

The partnership relation requires the highest good faith between partners, and will not permit one partner to gain any advantage over his co-partner by the slightest misrepresentation or concealment.

Partners Trustees for Each Other.

Partners are trustees for each other, and as such one partner may not use partnership property for his own profit, and, if he does, may be required to account for the profit made, or value of its use.

Evidence to Avoid Partnership Settlement.

A member of a partnership who seeks to avoid a partnership settlement, and to secure a full accounting, must not only show facts which would authorize a court of equity to disregard the settlement, but also produce evidence of such a character that an accounting can be made. In the absence of such evidence, the balance found in the settlement will not be disturbed except as to items which are shown to be erroneous.

Equity of Partnership Accounting.

In an action for an accounting between partners, where it appears that one of the partners contracted to devote his entire time to the management of the partnership business, and that he has retained from the firm funds compensation for his entire time, when in fact he devoted only a portion of it, a court of equity, upon a final adjustment of the partnership accounts, may make deduction for the value of the portion of his time not so employed.

Appeal from District Court, Grand Forks County; *Templeton*, J.

Suit by George D. Lay against Lewis Emery, Jr. Judgment for plaintiff. Defendant appeals.

Modified.

Bosard & Bosard, (Cochrane & Corliss, of counsel) for appellant.

Under the contract between the parties, Lay had exclusive management of the business, Emery being engaged with large interests in the East, was unable to give any personal attention to the farm. Lay bound himself by contract to keep accurate accounts and to make yearly reports, he to have $1,200 as compensation for his services, to be considered and accounted for as part of the operating expense of the farm, all profits, in each year, up to $6,000 were to be paid to the defendant; profits in excess of $6,000 to be equally divided. The trial court found that this contract created a partnership. *Galveston Ry. Co.* v. *Davis*, 23 S. W. Rep. 301. The plaintiff contracted to give his entire time to the farm, but the uncontradicted proofs show that for five years he did not give it to exceed one-half his time. One-half of the salary collected by him should be restored. A court of equity will decree such compensation in form, kind or amount as shall be needed to make good any losses arising from violation of partnership duties. Parsons on Partnership, 223. Where the managing partner keeps the books so imperfectly and badly that the true state of accounts and transactions of the firm can not be ascertained from them, every presumption should be applied against the person in fault. *Dimond* v. *Henderson*, 2 N. W. Rep 73; 2 Lindley on Partnership, 808; *Van Ness* v. *Van Ness*, 32 N. J. Eq. 669; *Harvey* v. *Varney*, 104 Mass. 436, 444; Story on Partnership (6th Ed.) § 181; *Gray* v. *Haig*, 20 Beav. 219; 1 Story, Eq. Jur. § 468; *Walmsley* v. *Walmsley*, 3 Jones & Lat. 556; *Kelley*

v. *Greenleaf,* 14 Fed. Cas. 238; *Pomeroy* v. *Benton,* 57 Mo. 531, 546; *Kirwan* v. *Henry,* 16 S. W. Rep. 828; *White* v. *Lady Lincoln,* 8 Ves. 363, 15 Ves. 441. The plaintiff covenanted to conduct the farm in a good and husbandlike manner, using his best skill and judgment at all times. In violation of his contract he permitted it to grow to mustard, damaging the land, under the evidence, to the amount of $5,000. This damage is chargeable to plaintiff. *Carlin* v. *Donegan,* 15 Kan. 495; Parsons on Partnership, 223; 2 Lindley on Partnership, 783; *Murphy* v. *Croft,* 71 Am. Dec. 519; Story on Partnership, § 173; *Haller* v. *Owiez,* 23 Ark. 566; *Yorks* v. *Fozer,* 60 N. W. Rep. 846; *Lefer* v. *Underwood,* 41 Pa. St. 505. The plaintiff during the period he managed this farm deposited firm moneys in different banks with his personal deposits, blending all of such deposits together in one account, and checked therefrom indiscriminately for firm and personal uses—even his wife drawing checks against this common account. Plaintiff admits his inability to determine how much of these deposits were from the farm and how much were individual, or what sums were drawn out of this common account for his own use and for the use of the partnership, respectively. In such case the whole deposit should be treated in equity as belonging to the partnership, so far as it is incapable of being distinguished. 1 Story, Eq. Jur. § § 623, 468; *Pomeroy* v. *Benton,* 57 Mo. 545; *Kelley* v. *Greenleaf,* 14 Fed. Cas. 238; *Hart* v. *Ten Eyck,* 2 Johns. Ch. 62 & 108, and note at end of case; *Brackenridge* v. *Holland,* 20 Am. Dec. 128; *Jewett* v. *Dinger,* 30 N. J. Eq. 308; *Brakley* v. *Tuttle,* 3 W. Va. 126; *Railroad Co.* v. *Hutchins,* 37 Ohio St. 298; *Kreuger* v. *Cooney,* 45 Md. 592; *Weatherby* v. *Green,* 22 Mich. 318; *Moore* v. *Bowman,* 47 N. H. 501; *Diversey* v. *Johnson,* 93 Ill. 547, 569. This rule holding the party accountable for the entire mass, except in so far as he can clearly show what is his own property, is applied in all cases where a trust relation exists. The relation between copartners is fiduciary. 1 Beach on Trusts, § 91; Parsons on Partnership, § 231; 16 Am. & Eng. Enc. Law, 1054; *Pomeroy* v. *Benton,* 57 Mo. 538; *Brooks* v. *Martin,* 2 Wall 70; *Kelley* v. *Greenleaf,* 14 Fed. Cas. 238. It was error to permit the plaintiff in an action to settle partnership accounts to recover for tort against the defendant for the conversion of plaintiff's grain. *Bates* v. *Lane,* 28 N. W. Rep. 753.

Burke Corbet, for respondent, filed a printed argument without citation of cases.

YOUNG, J. This is an action for an accounting between partners. It comes to us for trial anew upon defendant's appeal from a judgment rendered against him in the court below. The case calls for a final adjustment of accounts, arising out of the operation by them of a large wheat farm, and covering a period of five years. In the latter part of 1889 the defendant, Emery, who was then the owner of a tract of farming land situated in Grand Forks county, consisting of about 3,250 acres, which was fully equipped with horses,

mules, cattle, machinery, feed, and provisions, including seed grain, necessary for its operation, entered into a contract with the plaintiff, Lay, relative thereto, the material parts of which are as follows: "This agreement, made and entered into this twenty-third day of December, A. D. 1889, by and between Lewis Emery, Jr., of Bradford, in the State of Pennsylvania, party of the first part, and George D. Lay, of Grand Forks, in the State of North Dakota, party of the second part, witnesseth: That the said party of the first part, for and in consideration of one dollar, the receipt whereof is hereby acknowledged, and for the further covenants and agreements hereinafter mentioned to be performed by the party of the second part, does lease and farm let unto the said second party the following described lands [omitting description]. Also all of the equipments to the foregoing premises, including horses, mules, cattle, hogs, turkeys, chickens, farm implements, house-furnishing goods, provisions, and feed, as are now upon said premises; all of which property is shown by an inventory hereto attached. * * * This said lease is to commence on the first day of January, A. D. 1890, and continue for the period of three years, and end on the 31st day of December, A. D. 1892. In consideration of the said leasing the said party of the second part agrees to give his entire time to the management and operation of said farm, and to conduct the same in a good and husbandmanlike manner, using his best skill and judgment at all times; to keep correct books of accounts of all receipts and disbursements, and all transactions regarding the management of the said farm; to keep a correct and complete list of all increase and decrease in live stock, and at the end of each year make a correct and complete report of his doings during the past year. * * * That said books of account shall be open to inspection at all times to the said party of the first part, his agent or attorney. * * * That the said party of the second part is to have full management, control, and operation of said farm, and all business transactions are to be carried on in his name, and he is to be wholly responsible for the full management of the same. * * * That there shall be allowed the sum of twelve hundred dollars as salary for the said party of the second part, as his compensation as superintendent of the said farm, and the same shall be reckoned as a part of the operating expense of the same. That, after all expenses are paid for the operating of said farm, then the said party of the first part shall draw and be paid the sum of six thousand dollars ($6,000.00) from the profits of said business. Then, if there shall be a balance of profits in the hands of the said party of the second part, the same shall be divided in equal portions, and each of the parties hereto shall take one-half. Then, at the expiration of this lease, the said premises shall be left in the same condition as when entered upon. That there shall be as many acres of ground plowed at the expiration as are now plowed. That there shall be an equal number of stock of all kinds left upon the said premises to be equal in value and condition. There shall be an equal amount of feed and grain left upon

the said premises, including hay, straw, or millet; also an equal amount of provision and fuel. In all cases natural wear and tear and destruction by the elements are excepted. At the expiration of this lease, should there be a greater number of stock of any kind or class, or a greater amount of provisions or feed for stock, or grain of any kind, or any article or thing or lands than is now upon said farm, the same shall be divided in equal portions, each of the parties hereto taking one-half. * * * Should there be at any time any expenses growing out of the running of said premises, and there should be no funds from the products to pay the same, then each of said parties hereto shall pay one-half, and each shall be given credit for the same." At the expiration of the three-year period this contract was extended by written indorsement thereon for two years more,—that is, until January 1, 1895,—without change, except that the salary of Lay was increased to $2,200 per year, and he, in consideration of such increase, relinquished an option, which he had secured in the original contract, for the purchase of one-half of the entire farming plant at a fixed price for such half of $50,000, divided into several annual payments at 6 per cent. interest. This is contained in the portion of the contract which we have omitted. Both parties have treated the contract as one of partnership, and it is so treated by them in this Court. By its terms the defendant parted with the possession and use of his farming plant for a term of five years. The title thereto, however, remained in him. The object of the partnership was to operate the farm for the mutual profit of the parties. In addition to having a share in prospective profits, the plaintiff was to receive a fixed salary as compensation for his services as manager of the business.

The farm was operated under this contract for the full period without disagreement of any nature between the parties. Neither during this entire time does there appear to have been any difference of opinion between them as to the meaning of its terms, or as to the rights which each had under it. The entire controversy arose upon the final settlement. From the time the contract was entered into, up to and after the date of its expiration, the defendant, Emery, who resided at Bradford, Pa., was not within the state, and did not see the property. Neither did he have any information concerning it and their business other than that received from the plaintiff, Lay, who was in exclusive control. Such information as he had was gained entirely from the letters and reports of Lay, and from conversations with the latter at Bradford, the defendant's home, which plaintiff seems to have visited annually, and sometimes at defendant's request, for the purpose of discussing the business of the partnership. It clearly appears that at all times the defendant had implicit confidence in Lay, and fully relied upon his reports and statements concerning their affairs. On December 13, 1894, just before the five years was up, Lay wrote to the defendant at Bradford, calling his attention to the fact that the lease was about to expire, and expressed a desire to close their matters up promptly.

He also stated that it would be necessary to have some one upon the ground to act for him, and asked if he could not come himself during the winter, and added, "I have paid all expenses for the year just past, and everything is in good shape for another year." On December 22d the defendant answered this letter, stating that he could not come, and requested the plaintiff to take a perfect inventory of the entire farm, and to come to Bradford, bringing a complete statement of everything, prepared to close the business up, or to make further arrangements for the future. In compliance with this letter the plaintiff went to Bradford, where several days were spent by them in adjusting their affairs. Finally, and on February 12, 1895, upon the statements and representation made by Lay as to the condition of their accounts, and upon the inventory showing the property then remaining on hand on the farm, a settlement was made, and reduced to writing. This settlement embraced two features: First. A separate and final settlement of all other matters than the adjustment of the excess and deficiencies of different kinds of property, which had to be determined by a comparison with inventory of property on hand when he took charge five years before. In this portion of the settlement the defendant, Emery, was charged with $3,431.04 as his half of alleged deficiencies for two years' business, being in all $6,862.07, made up from an alleged shortage of $1,026.20 for 1892 and $5,835.87 for 1893. He was also charged with the sum of $423.15 interest on the foregoing sum, to compensate Lay for the use of the money for the period for which he claimed to have advanced it. The rate charged was 12 per cent. for nine months and 10 per. cent. for four months. Defendant was also charged with $1,552.20 for an assignment made to him at that time of Lay's one-half interest in a certain school-land contract which had been paid for by partnership funds; also $252.67 to Lay as interest on the last sum. In addition, defendant took from plaintiff, at what was said to be cost price, an engine and feeder, for which he was charged $1,060. He was credited with a general balance of account of $221.13, then in plaintiff's hands from outside matters, and $2,000 for a draft remitted by him to Lay, August 9, 1894. For the balance remaining against him upon this settlement defendant gave Lay his four notes, due at different dates, amounting in all to $4,600.93. These notes have been paid. After completing this portion of the settlement, they compared the schedule of 1890, which showed the amount in kind and value of all property originally placed in plaintiff's charge, with the inventory which the plaintiff had brought with him at defendant's request. From this comparison a schedule in writing was made, showing in detail the number, kind, and amount of each class of property in excess or less than that received in 1890, the time when the partnership was formed. This schedule bears the heading, "Memorandum of Settlement between Lewis Emery, Jr., and George D. Lay, made February 12, 1895," followed by this statement: "Under the terms of the contract, the following surplus and under-

plus items were determined and remain open for adjustment and division." Then follows a list of surplus items consisting of 18 horses, 18 mules, 10 Holstein cattle, 8 common cattle, 156 chickens, and 6,400 pounds of salt pork; the underplus items being 4 hogs and 3,850 pounds of binding twine. The excess of wheat was found to be 4,400 bushels, which was to be disposed of as follows: "From this overplus of 4,400 bushels of wheat there is to be sold sufficient to pay the deficiency for 1894, after which the remainder belongs to Mr. Emery." After this settlement was concluded, Lay returned to Grand Forks county, and continued at least in nominal control of the property pending the coming of Emery to complete the settlement of the surplus items then on hand. In March thereafter Emery took charge of the property in person, and in so doing he also took possession of a quantity of wheat, consisting of 1,129 bushels, which was plaintiff's separate property, produced on another farm, but stored by him in the Emery elevator, along with the partnership grain. He also got possession of a certain horse, which Lay claimed as his own. Almost immediately after assuming control of the property, Emery's attention was called to several discrepancies in Lay's reports of his stewardship, which aroused his suspicions as to their accuracy and integrity. In reading over the accounts to a Mr. Miller and his wife, who lived on the farm, and together had been in the employ of the partnership for several years at an annual salary, he learned that the amount of their wages was reported $28 in excess of that actually allowed, and it was further discovered that they had not in fact been paid for almost three years' wages, and that on November 20, 1894, they had accepted Lay's duebill for $1,785.59 for the balance due for that time, although in his reports for each of these years he had charged the farm with their full salary. Other instances of real or supposed delinquencies were developed, which induced defendant, Emery, to refuse to proceed with the division of the remaining property, or to surrender any portion of it. In October thereafter, Lay instituted this action for an accounting. His complaint, which consists of 22 separate paragraphs, sets out various items upon which he claims the right to recover judgment against the defendant for the aggregate sum of $8,855. For instance, he demands $1,000 for legal services rendered in collecting certain rents for him from other property during this time; $2,202.98 for deficiencies in receipts over disbursements for the years 1892, 1893, and 1894; also certain sums for improvements made, machinery bought, and taxes paid; also for one-half interest in the school-land contract, which has been referred to; also numerous other items, which need not be mentioned further than to say that they include all the items listed by him for further division and adjustment in the schedule made at Bradford on February 12, 1895. The complaint, however, entirely ignores the settlement made at Bradford.

The defendant answered, alleging, among other things, that he

had no personal knowledge concerning their affairs; "that all his means of information as to the amounts produced on said farms, and expenses thereof, and of any of the items of said business, were obtained from annual reports and statements made by the plaintiff to the defendant at Bradford, Pa., and, trusting and relying upon the integrity of this plaintiff, and his reports and accounts, the same was permitted to run for the period of five years"; and avers "that this plaintiff did use and appropriate to his own use large amounts of wheat and produce of said farm, and did purchase for his own individual use, and not for the use of said farm, large amounts of merchandise out of the common fund, and did squander and dissipate the property of this defendant; that the plaintiff did not keep accurate accounts of his transactions, and did not make entries upon said books, or account to this defendant for property taken from said farm, and moneys used from the proceeds thereof, and in his own private transactions, and did not keep accurate account of his transactions in the course of said business, as required by said contract, and did carelessly and negligently permit said property to become impaired in value, and did divert large sums of money for the uses and purposes expressed in the contract between the parties hereto, and diverted from the defendant; and that by careless, negligent, and fraudulent transactions on the part of the plaintiff, this defendant has suffered loss to an amount exceeding fourteen thousand dollars in the properties of this partnership, diverted and unaccounted for, and otherwise as will hereinafter more particularly appear." It is also alleged that the receipts were greater than reported, and expenses less; also that the plaintiff used "the horses, men, seed grain, and farm implements of this defendant in plowing, seeding, and working his own private farms, and that the seed grain used by him on such farms was not accounted for, and that the hired help, and the board, the teams, and board thereof, the machinery, and their rental value, have never been accounted for or reported to this defendant," all of the value of $2,000; further, that plaintiff appropriated to his own use during these years, provisions, grain, etc., of the value of $2,100. And, particularizing, defendant further alleges: "That in the year 1892 the plaintiff sold to the North Dakota Milling Company wheat from the farm aforesaid to the value of $7,209.99, no part of which has been accounted for to this defendant. That he also sold to N. G. Larimore property of the value of $900, and to other parties seed wheat to the value of $1,082.25, or a total of $9,092.24, in the year 1892, over and above that accounted for, and that said sum was entirely unaccounted for to this defendant; and this defendant avers upon information and belief that with said moneys so fraudulently appropriated this plaintiff purchased $9,000 of stock in the Merchants' National Bank of Grand Forks, North Dakota, and $1,000 of stock in the Farmers' Bank of Emerado, and that all moneys which went into such stock, or a large proportion thereof, were moneys diverted from and misappropriated by plaintiff from said farm. That plain-

tiff is now the owner of said stock, or a large proportion thereof, purchased with the moneys of this defendant, or of said partnership, and unaccounted for." The total loss resulting from the various sources enumerated in the answer is estimated therein at $14,000. Both plaintiff and defendant pray for a full accounting. Upon the evidence submitted the trial judge found: "That on the 12th day of February, A. D. 1895, the plaintiff and defendant had a full and complete settlement of all matters arising out of the contract hereinbefore mentioned, and the operation of the business connected therewith, excepting the division of the wheat, provisions, and live stock on the premises January 1, 1895, owned jointly in excess of the amount of like property owned by defendant on the premises January 1, 1890, and except taxes of 1894; and said settlement included all legal and other services rendered by plaintiff to defendant." The court adopted the settlement so found to have been made, and merely adjusted the items in controversy which were not fully concluded by it by allowing the plaintiff $763.67 as his interest in the surplus wheat necessary to repay him for one-half of the deficiency for 1894, $125 for the horse claimed by him, $690 for wheat belonging to him personally, $1,527.40 for his one-half interest in the excess of live stock; making a total of $3,106.07. From this was deducted $404.25, the value of the deficient property, and $477.32, being one-half of the 1894 taxes, leaving a balance due plaintiff of $2,224.50, for which judgment was ordered and entered.

Upon this appeal there is presented for review a mass of evidence, a portion of which is contained in a printed abstract larger than the Revised Codes, and the remainder is presented in the form of original exhibits, consisting of accounts, checks, reports, receipts, and bank books, etc., which, if printed, would make several volumes more of an equal size. These original exhibits, through the courteous stipulation of counsel, we are permitted to explore the same as though embodied in the printed record. A careful examination of all of the evidence contained in the record relating to the settlement found by the trial court satisfies us that the settlement was made as found, and that finding is therefore adopted as the finding of this Court. That it was made does not admit of doubt. The only parties present when it occurred were Mr. Emery and his secretary, Mr. Jones, and plaintiff, Lay. It is supported by the direct evidence of the two first named, and is denied by plaintiff, Lay, only in part. The written memoranda in which the settlement was embodied are not impeached in any way, and are conclusive. If this were all, and the adjustment by the trial court of the items above mentioned is correct,—and we think it is,—we would merely affirm the judgment, for it is an accepted rule that where partners conclude a settlement of their affairs, and reduce it to writing, without fraud, duress, misrepresentation, or concealment, or mistake of fact, and dealing at arm's length, they are concluded by their act, and it will not be disregarded by the courts. See *Little* v. *Little*, 2 N. D.

175, 49 N. W. Rep. 736. The same doctrine applies to a partial settlement. In *Stretch* v. *Talmadge*, 65 Cal. 510, 4 Pac. Rep. 513, it is said that: "It is undoubtedly generally true that in an action to dissolve a partnership, and for a settlement of its affairs the account must be taken from the beginning to the end of the partnership. But, if there has been a partial settlement between the partners themselves, that fact may be proved in the action (*Clark* v. *Gridley*, 41 Cal. 119), and, if proved, the settlement will be considered valid between the partners themselves, unless it is assailed on the ground of mistake, error, or fraud. Story, Partn. 349. If there is no valid objection to the settlement, it is conclusive upon the parties so far as it goes, and leaves open only the unsettled portions of the account." In this case the plaintiff neither alleges, nor does the testimony disclose, any facts which would, as to him, serve as ground for opening the settlement entered into. On the contrary, it was based wholly upon information which he himself furnished, and as to matters concerning which he had exclusive and entire knowledge. On his part he acted knowingly; and if it here appeared that his reports were accurate, and his disclosure of the facts was complete, so that the defendant was placed upon an equal footing with him, the settlement would be binding upon both. But such is not the case. Without going into detail here, it is sufficient to say that the evidence fully establishes conditions which authorize a court of equity, at defendant's request, to disregard the settlement made, and require a complete examination of the partnership accounts during the entire period of its existence. The partnership relation requires the highest good faith between the partners, and will not permit one partner to gain any advantage over his co-partner by the slighest misrepresentation or concealment. Their relation is confidential, and they are trustees for each other, and as such one may not use the partnership property for his own profit, and, if he does, he may be required to account for the profit made, or pay the value of its use, at the option of the injured partner. This general doctrine of the courts is embodied in the legislative enactments of this state. See section 4265, 4273, 4379, 4380, 4391, 4393, Rev. Codes. The case of *Pomeroy* v. *Benton*, 57 Mo. 531, is somewhat similar to the case at bar. One of the partners lived in New York, the other at St. Louis, where he had charge of the portion of their business done at that point. The action was to recover profits made by the latter out of private speculations with partnership funds. The Court said: "The relations of trust and confidence existing between the plaintiff and himself placed him under an equitable obligation to communicate all he knew of the matter then pending to the plaintiff, to 'make a clean breast of it,' to disclose to him all the material facts within his knowledge touching the negotiation then in progress as fully as though he had stepped upon the witness stand and kissed the book; and nothing short of a complete disclosure of this sort could exonerate the defendant from the charge of undue concealment, which, under circumstances like

the present, is, in the sense of a court of equity, itself a fraud. * * * The doctrine here asserted—that confidence reposed and the fullest disclosures are, in equity, correlative terms—is one in full accord with the authorities above mentioned, and must commend itself to the cordial approval of every just mind, while it rebukes the manifestation of that spirit which, looking to its own advantage, is too prone to diregard the rights of those to whom it owes the fealty incident to intimate and confidential association." The case at bar is one peculiarly requiring the exercise of the highest degree of good faith on the part of the plaintiff. The defendant had not only intrusted to him the personal custody and management of a large amount of property, and of great value, but had given into his charge the entire duty of attending to the finances of the partnership. The only value which plaintiff brought to the partnership was such personal service as he rendered in connection with the duties he had specifically agreed in the contract to perform, which may be epitomized as follows: First, to give his entire time to the management and operation of the farm, and to give to it his best skill and judgment; second, to keep correct books of accounts of all receipts and disbursements and alf transactions regarding the management of the farm, and, in addition, to keep a record of the increase and decrease of stock, and report yearly. The defendant not only asserts that plaintiff has acted in bad faith, but has actually appropriated partnership money and property to his own use, and has used partnership money and property for his private gain, and, in addition, has charged the partnership for expenses in some cases in greater amounts than in fact was paid. It is not possible to go into all the items in detail, or discuss them at length, in this opinion. Our discussion must necessarily be limited to the most important matters. Defendant contends that the plaintiff has failed to account for over 20,000 bushels of wheat grown upon this farm between January 1, 1890, and January 1, 1895. This shortage is based upon a comparison of the number of bushels shown to have been placed in the Emery elevator on the farm with the number of bushels accounted for by the plaintiff in his reports as sold or used for seed. A discrepancy of about that amount exists upon the basis of such a comparison. The bulk of the wheat, however, which defendant contends has not been accounted for is clearly shown to be a portion of the crop of 1891, not sold in that year, but carried over, and sold in 1892, and is now a known quantity. The crop of 1891 was unusually large, and good prices were realized. Plaintiff's report made at the close of that year shows that he had sold only a portion of the grain, giving the number of bushels, and reported that from the sum realized he had paid all expenses of that year, paid his 1891 salary, paid Emery his $6,000, and to himself and Emery each the sum of $1,500 profits, and further showed a balance of cash on hand of $12.48. In addition, there was reported on hand after sale, after taking out seed, 13,000 bushels of wheat by estimate; also a large quantity of oats,

barley, and other produce. No written report of the sale or disposition of this remaining grain was ever made by Lay. The real amount of wheat is now shown to have been about 14,000 bushels, and that it was sold in 1892 by Mr. Lay. Further reference to this will be made later. The evidence as to the remaining portion of the alleged shortage of wheat is of such a character that we are unable to predicate upon it a conclusion that plaintiff appropriated any part of it to his own use. The actual amount used for seed each year is not definitely known; neither is the dockage upon the amount sold. It also appears that a portion of the wheat included in defendant's estimated shortage was the individual wheat of plaintiff placed in the Emery elevator, but grown upon other land. Our attention will therefore be directed exclusively to the above unreported wheat of 1891, disposed of in 1892. Plaintiff's written reports are entirely blank as to receipts and disbursements from January 1, 1892, up to October 17, 1892. Since defendant assumed control of his property, it has been disclosed, and stands admitted in this record by plaintiff, that during this period he received and had the following moneys of the partnership, and from the sources named:

Balance from 1891	$ 12 48
Northern Milling Co. (10,520 bushels wheat)	7,209 99
N. G. Larimore 2,553 bushels wheat	1,900 00
Wheat sold after seeding, 928 bushels	668 16
Elevator rent	1,000 00
Colts killed on railroad	900 00
All other sources	200 00
Total	$11,890 63

Out of this he paid to Mr. Emery, in June, 1892, the sum of $2,000 on a further division of profits, and was entitled to a like amount himself, leaving a net balance to be still accounted for of $7,890.63 during this limited period. Plaintiff's explanation is that he expended all of this money in paying farm expenses, and all prior to October 17, 1892, except the sum of $608.26, which he fixes as the balance on hand belonging to the farm at the last named date. It appears that the plaintiff, although residing with his family in Grand Forks, had an office in the house on the farm, where all his books, papers, and vouchers concerning farm matters were kept. This house was destroyed by fire on October 17, 1892, and with it plaintiff's papers. This accounts for the confusion in this year, and is relied upon by plaintiff as a reason for not reporting in detail the receipts and disbursements for this period. The fact of the fire was reported to Emery, who was also informed of the confusion caused in the farm accounts by reason of the loss of the vouchers, and of the practical difficulty in preparing any account of their affairs which would be more than an estimate. Some time after the fire,—in November or December, which is not clear,—

plaintiff went to Bradford, where he spent several days. He then stated to Mr. Emery that the records were destroyed, and that he could not show the condition of affairs prior to the time of the fire, except that he had in the bank at that time $608.26 that belonged to the farm. It also appears that it was agreed that Lay should start his books at that date, with this estimated balance of $608.26 due the farm. It is also clear that Lay reported that all expenses were paid up to the time of the fire. There were present at Bradford at these conversations Mr. Emery, Mr. Jones, and plaintiff. Jones says: "There was no settlement of the past time made; it was simply a rendering of a statement to Mr. Emery, and accepted by Mr. Emery, because there was no other thing to do." Emery testifies that Lay never made a report of the disposition of the surplus wheat, and that it was not mentioned; that "he (Lay) said, as near as he could tell all there was due to the farm was the bank account of six hundred and some odd dollars, and we struck a balance on that basis after the fire"; and that no figures were given to him as a basis for that conclusion. Lay does not testify that he detailed to Emery the items of receipts which are now shown to have been received by him from the 1891 business, but presumes he did mention them generally. We are satisfied that no detailed statement was made, but that the balance struck of $608.26 was based entirely upon Lay's statement that that sum was the actual balance due the farm at the time of the fire, as near as he could determine. The items of receipts and disbursements were not given, even from memory. The amount was one arbitrarily fixed by Lay, and accepted by Emery as correct. A very careful examination of the evidence on this point has convinced us that this balance was not correct, and did not represent the amount then due the farm by at least $2,700. This conclusion is based largely upon the plaintiff's evidence, and his own computation made at that time upon a small slip of paper, which somehow was preserved by being retained in his bank book, and was produced therefrom at the trial, and offered in evidence by the defendant. Lay testifies that he made the figures upon it, and further said: "I estimated that I had that much cash on hand, $608.26. That is the identical paper that the figures were made on in their office, and it is the basis upon which the settlement was made, and Mr. Emery consented to it. I have that book with me, and that paper, and that piece of paper was preserved by being in the bank book." This exhibit is written in lead pencil, and contains two columns of figures, one of which appearently represents the entire cash on hand at the time of the fire. The total, as it appears thereon, is $10,752.50. The exact amount standing to Lay's credit in the bank at this time, as shown by his bank book, which is in evidence, is $10,969.35. The difference in the amounts is probably due to outstanding checks. The amount of cash on hand in the bank is now shown to be less than the sum actually received by Lay from the 1891 business during the time in question, for it stands admitted by him in the record that between January 1,

1892, and the date of the fire he received $11,878.15 from the sale of the surplus wheat, elevator rent, etc. The other column of the exhibit represents seven different items, which are deducted by Lay to produce the balance of $608.26 reported to Emery, and accepted by him as the balance due the farm at the date of the fire. The error in this balance of $608.26 to which we now allude is found in two items improperly deducted from the cash on hand. They are items shown upon the exhibit in the words and figures written by Mr. Lay as follows: "Superintendent's salary, $1,200." "Offset, Emery, $3,500." The first of these—the salary item—we find was improperly deducted, for Lay's salary as superintendent for 1891 had already been paid, and his salary for the year 1892 was subsequently paid from the proceeds of the crop of that year, as shown by his reports, which are in evidence. The second item, "Offset, Emery," evidently is a deduction for his benefit of the sum of $3,500 to equalize the division of profits from the 1891 crop, Mr. Emery having had that sum up to the date of the fire. In this we are convinced there was an error, and that $1,500 of this sum should not have been deducted. It is true that up to the time of the fire there had been a division of $3,500 profits to each, but only $2,000 each of this was out of the 1891 grain carried over. The other $1,500 to each had been divided prior to January 1, 1892, and was distributed to each out of the crop sold in 1891, as shown by Lay's reports. The plaintiff was accordingly entitled to retain out of farm funds for this period only an amount equal to that received by Emery, which was $2,000. This exhibit, which is vouched for as the basis upon which the balance was struck at Bradford by Mr. Lay, and is written by him, when considered in connection with his reports, does not seem to admit of any other interpretation than that we have given, and our examination of his evidence does not disclose any explanation of the deduction of these two items. Counsel suggests that these amounts represented Lay's salary for the preceding year, and his share of the profits received prior to January 1, 1892, which he might have carried in the bank, and had there at the date of the fire. This explanation would be satisfactory if it were borne out by the evidence, but not only is there no testimony that such portion of the money in the bank as belonged to him remained unused by him, but it does appear that during this very period he made cash payments in considerable amounts for farm lands and town lots; also that this bank fund was used generally by him in payment of private accounts, and for family expenses. As has been noticed, no account of the receipts and disbursements for the period between January 1, 1892, and October 17, 1892, was ever made by Mr. Lay other than such as occurred at Bradford. It has developed that he received $11,878.15. The only part of this he now accounts for so that it can be identified is the sum of $4,000, being $2,000 to Emery and a like amount to himself upon division of profits. The explanation in the evidence as to the balance is that it went to pay farm expenses, but no items of payment are attempted

to be pointed out. We are convinced that a portion of this sum unaccounted for is contained in the two errors pointed out, and that plaintiff has therefore had the use of $2,700 of undivided partnership funds since October 18, 1892, and must account therefor to the partnership, with 7 per cent. interest. The amount at this date, with interest, is $3,941.20. Inasmuch as this money represents the proceeds of wheat sold in a year when there was a surplus for division, each being entitled to a distributive share, the plaintiff is charged with only one-half of this sum, or, in exact figures, $1,970.60, which sum is here found against him.

Other delinquencies in the use of farm money are urged to have existed, and some of them are shown by the evidence. For instance, it appears that on January 15, 1892, the plaintiff had issued to himself, by the bank wherein the partnership funds were deposited commingled with his own, an interest-bearing certificate of deposit for $3,000; also another for the same sum on April 14, 1892; further, that on October 18, 1892,—the day after the house burned,—these were cashed, and the proceeds thereof, along with enough of the other moneys there on deposit to make $9,000, were invested by plaintiff personally in bank stock. For the use of these funds, or the profits made by their use, the plaintiff is undoubtedly liable to the partnership. The evidence, however, fails to show what profits were earned by the funds so diverted, and what the exact amounts were, and the length of time they were withheld from the partnership business. Under such conditions we are not able to fix a measure of relief upon a basis of the profits earned by the use of partnership funds.

It is also urged that plaintiff used a large amount of provisions taken from the farm to support his family in Grand Forks, such as butter, eggs, poultry, etc., and it is true some such property was taken, but in this it appears that plaintiff acted in good faith, and with the assent of Mr. Emery, for plaintiff informed him by letter that he was doing so, and explained that in return therefor he was keeping at his own expense the horse used to drive to and from the farm. Plaintiff is also charged with using defendant's teams and machinery, men, etc., to farm other lands for his sole benefit. The evidence shows that during the different years, to a varying extent, the men and farming outfit did work upon other lands in which the plaintiff was interested. This he explains by stating that such work was done when there was a surplus of horses and help, and to the farm's advantage, and that the farm was compensated with a share of the crops which they had assisted in producing, or by a return of work at other times. Here again we are unable to determine from the evidence the amount of profit plaintiff made by such use of partnership property.

One more point remains to be considered. It is contended that plaintiff did not devote his entire time to the partnership business,

and should not, therefore, be allowed to retain compensation for such portion of the time as is shown to have been otherwise employed. To this we agree. It is apparent, from a consideration of the large interests involved, and the further fact that the entire property and its control and the management of the partnership business were instrusted exclusively to him, that his agreement to give the business of the partnership his entire time was the controlling inducement which caused defendant to enter into the contract. A full performance was required, otherwise the partnership would suffer; for, so far as an intelligent management of the actual farming operations and a judicious control of the expenses were important in making a success of their venture, they were entirely in his hands. It is in evidence that during the entire five years the plaintiff was not at the farm on an average more than one-half of the time, and this is not seriously controverted by him. But it is his contention that he was there when necessary, and that, when absent, he was engaged in looking after the partnership's financial affairs. If the evidence supported this, it is patent that there would be no legal ground for making a deduction from his salary, for it is apparent that plaintiff might have rendered valuable service by employing his time elsewhere in securing advantageous bargains in the purchase of supplies, and also favorable prices for the farm produce, and in otherwise promoting its interests; for such services without doubt would be relatively more important than the actual management of the farming operations. The evidence, however, does not show that this was the case. On the contrary, it discloses not only that he did not interest himself in furthering the interests of the partnership, but it shows affirmatively that he was generally engaged about his own personal affairs, and in some instances with the use of farm property and funds. As an important instance of plaintiff's failure to render the service required of him, we cite his failure to keep the accounts of the partnership business provided for in the contract. Our examination of the record before us has placed beyond doubt that at no period did plaintiff keep a record of the partnership affairs from which could be determined the exact state of accounts. No cash account was kept. No record of the items of receipts and disbursements, of the date of the transactions. No account was kept showing year by year the separate amounts received or advanced by the separate partners. Although the receipts and disbursements extended into thousands of dollars each year, no separate bank account was kept for the farm, and its funds were mingled indiscriminately with his own private funds, and without means of identification through any account kept by him. Plainly, such bookkeeping was not contemplated in the contract. But we are not to presume that it was expected that Mr. Lay, who had just given up the practice of law, would bring to the keeping of the accounts of the partnership the system of a skilled accountant, and at the same time to the actual management of the farm the

judgment of an experienced farmer. While it appears that Mr. Emery had some knowledge of plaintiff's method of bookkeeping, and while he may have waived a right to object to it as unskillful, he may nevertheless insist that it be reasonably accurate, and truly represent the exact condition of affairs. It also appears that the moneys belonging to the partnership, as well as certain private money of Mr. Emery, were all deposited by him in the bank to his own credit, and portions thereof checked out by him in various amounts. Several instances are shown where he obtained rebates for his own personal benefit upon accounts paid by the partnership, and charged as expenses against it in the full amount. One of these is a store bill rendered by R. B. Griffith for merchandise furnished the farm, the amount of the rebate being $97.53. In another case a lumber bill of E. J. Myra, charged in full to the farm, contained items furnished to the plaintiff personally, amounting to $66.86. It also stands admitted that the threshing engine and feeder which were put in at the settlement on February 12, 1895, at $1,160, which was said to be cost price, in fact cost but $1,110. Reference has already been made to the $28 discount in the account of Mr. and Mrs. Miller. To this was coupled the further delinquency of reporting their wages as paid for three successive years, and settling with the defendant upon that basis, when in fact they had not been paid. These and several other items of a similar nature which have been disclosed were presented to the trial court in the form of a correction account, and were adjusted in its findings, so that they will not enter into the computation made in this Court. To what has already been stated it is needless to add more to show that plaintiff did not devote all of his time or render the services in connection with the management of the financial affairs of the partnership which the contract required, and that such failure was the direct cause of serious loss to Mr. Emery; further, that he entirely failed, both in letter and in spirit, to keep the correct account of its receipts and disbursements, which both good faith and his contract demanded. Failing in this, he is not entitled to recover for the value of such portion of his time as is shown not to have been employed in the partnership business.

Our duty in this regard is expressed in 1 Story, Eq. Jur. § 468, as follows: "Courts of equity adopt very enlarged views in regard to the rights and duties of agents, and in all cases where the duty of keeping regular accounts and vouchers is imposed upon them they will take care that the omission to do so shall not be used as a means of escaping responsibility or obtaining undue recompense. If, therefore, an agent does not, under such circumstances, keep regular accounts and vouchers, he will not be allowed the compensation which would otherwise belong to his agency" *White* v. *Lady Lincoln*, 8 Ves. 363; *Lupton* v. *White*, 15 Ves. 441. The right and duty of a court of equity to charge back to a managing partner the value of services not rendered by him is recognized in *Weeks* v. *McClintock* (Ark.) 6 S. W. Rep. 734; *Marsh's Appeal*

(Pa.) 8 Am. Rep. 206; *Leighton* v. *Hosmer,* 39 Ia. 594; *Redfield* v. *Gleason,* 61 Vt. 220, 17 Atl. Rep. 1075. This principle appeals to us as equitable and just. Upon this basis the plaintiff must be charged with the sum of $4,000, being one-half of his salary for five years. In making this reduction we disregard such compensation as was received by plaintiff by way of profits, which amounts to a considerable sum over the deficiencies advanced by him, and is entirely favorable to him. The adjustment of the items of surplus and underplus made by the trial court, including certain other propety taken by defendant, meets with our approval, and the total sum of $2,224.50 so found to be due the plaintiff therefor shall stand. In conclusion we may say that the facts shown entitle the defendant to a full accounting since January 1, 1890, at the hands of the Court. But, on account of the doubtful character of the evidence submitted for our consideration an accurate accounting is not possible. We are limited, therefore, to charging back such items of error as are satisfactorily shown. Outside of these items, the settlement of the parties, though possibly replete with errors, must stand. In so holding we do not permit ourselves to even hope that complete justice has been done. But the fault lies at the door of the parties themselves,—the plaintiff directly for producing this chaotic condition of the accounts, the defendant for permitting it to continue after he knew the confusion in which they were enveloped.

Summarizing, we charge the plaintiff with the sum of $1,970.60, being the amount of the error in the report of cash on hand on October 18, 1892, with interest to date; further, with the sum of $4,000, the sum determined by us as retined for services not rendered,—making a total charge of $5,970.60. We credit him with the amount found by the trial court, $2,224.50, leaving a balance due to the defendant from plaintiff of $3,746.10, for which judgment is hereby given. The judgment of the District Court is reversed, and that court is directed to enter a judgment in favor of the defendant and against the plaintiff for the amount here adjudged to be due. All concur.

ON REHEARING.

In a petition for rehearing plaintiff urges that, inasmuch as this is an adjustment between partners, he should not be charged with the entire $4,000 which we have found he retained from farm funds for services not rendered, his contention being that this sum should be returned to the partnership; and that as a partner he is entitled to one-half of it, or, in other words, as between Emery and himself he should be charged with but half of the $4,000. This would be true if the partnership had discharged all of its obligations, and the sum so returned represented undivided profits. But such is not the case. It appears that for the unadjusted year, 1894, no portion of the $6,000 due Emery has been paid. It is apparent that there can be no division of funds to the partners as such until this is paid, and until that time the funds of the partnership must be applied to discharging that obligation. Under this state of facts the $4,000

of partnership funds in Lay's hands is all due to Emery, and is properly charged to Lay. The deduction of the item of $1,970.60 for the error in the report of farm moneys in Lay's hands at the time of the fire was made after a most careful examination of all the evidence tending to throw light on that period. Further examination has not changed our views. It is admitted that at the date of the fire Lay had received $11,878.15 of partnership moneys since his last report. The computations made by Lay upon Exhibit 19 refer only to this period, and evidently were made with a view to show the balance of cash remaining in the bank belonging to the farm. Lay says: "This was intended to cover all of the matters of 1891 that had not been settled, and all of the affairs of 1892 up to the fire. It included the whole. That is what it had reference to." Taken as an explanation for this period, it is clear that the two items, viz: "Lay's salary" and "Offset, Emery," were improperly deducted. It is true, we have given this exhibit a weight and significance not attached to it by counsel for either party or by the trial court. It stands in record, however, as the only explanation offered by Lay as to the manner the balance of $608.25 was found. Should we reject it, as counsel for plaintiff suggests, as meaningless, then plaintiff would have to account in detail for the entire sum received by him during this period, for it is only through this attempted settlement that it can be contended that the defendant has waived his right to have an itemized account of the receipts and disbursements from January 1, 1892, to October 17, of the same year, which the evidence shows could have been made with tolerable accuracy. We think that it is our duty to give weight to this exhibit, which is offered as the only explanation for the balance struck at the date of the fire, and then correct the errors patent upon its face, rather than to utterly ignore it, and charge the plaintiff with all of the farm moneys shown to have been received by him during this period, and which are not otherwise accounted for or explained. We find, however, that in adopting the judgment of the District Court we carried into our judgment two errors contained in its adjustment. By the terms of the settlement of February 12, 1895, embodied in the written memorandum, the partnership wheat on hand was to be sold, and the deficiency for the year 1894 paid from it, and the balance was to belong to Emery. Here the terms of the settlement govern us. Lay has individually paid the deficiency for that year, amounting to $1,527.34. This he was entitled to have back from the sale of the wheat. The District Court gave him but half. He was also charged with one-half of the 1894 taxes. This was error. Viewed as a part of the farm expenses,—and the evidence shows that it was so considered in prior years,—it should have been paid from the sale of the wheat which Emery had taken possession of. These errors we correct by crediting the amount of these two items upon the judgment heretofore ordered. The judgment is thus reduced to $2,505.11, and, as so modified, will stand. The petition for rehearing is denied.

(79 N. W. Rep. 1053.)

MARGARET TROST *vs.* THE CITY OF CASSELTON.

Opinion filed July 10, 1899.

Municipal Corporations—Injury From Defective Sidewalk—Sufficiency of Notice—Necessity of Notice.

Section 2172, Rev. Codes, declares that all claims against cities for injuries received by reason of defective sidewalks, etc., shall within 60 days thereafter be presented to the mayor and council by writing duly verified, "describing the time, place, cause and extent of the damage or injury." The following sections declare that no action can be maintained on account of such injury unless such notice has been given. Plaintiff presented her notice in proper time, definitely and distinctly locating the particular place on the sidewalk where the obstruction existed and the injury was received. At the trial her undisputed evidence located the obstruction and injury 100 feet distant from the designated place. Thereupon plaintiff, by leave, amended her complaint to conform to the proof. Thereupon defendant moved to dismiss the complaint as not based upon any sufficient notice. Motion denied, and the question of the sufficiency of the notice submitted to the jury. *Held* error. The sufficiency of the notice was a question of law for the Court, and, as matter of law, such notice was insufficient to sustain the amended complaint.

Statute Requiring Presentation of Claim Mandatory.

The sections of the statute above mentioned are mandatory, and make the presentation of a proper notice a condition precedent to any recovery.

Appeal from District Court, Cass County; *Pollock*, J.

Action by Margaret Trost against the City of Casselton. From a judgment for plaintiff, defendant appealed.

Reversed.

Pollock & Scott, for appellant.

The damages are excessive, the plaintiff, a woman of sixty years, received by her fall a bruised arm and shoulder. Dr. Hormell, the only expert for plaintiff, indicated that in his opinion the fall may have caused or aggravated an attack of heart trouble. If chronic heart trouble aggravated the injury, the jury should have found what part of the damage was caused by the fall and what part by chronic disease, and have charged the defendant only with the damage caused by its negligence. *Shumway* v. *Walworth*, 57 N. W. Rep. 251. There was no evidence that the accident was caused as alleged in the notice of claim and in the complaint, viz: by reason of a dangerous obstruction of ice and snow. The evidence did not disclose that the accident was the direct or proximate cause of the damage alleged to have been suffered. *Dolan* v. *City*, 61 N. W. Rep 564; *Lane* v. *City*, 57 N. W. Rep. 93; *Weber* v. *Greenfield*, 42 N. W. Rep. 101. If the plaintiff can show that the defendant had knowledge of all the facts which the law requires to be set forth in the notice, the court can as consistently hold that the giving of city notice of claim is unnecessary and might be dispensed

with. This, however, is not the law. *Shalley* v. *Danbury Ry. Co.*, 30 Atl. Rep. 135; *Underhill* v. *Town*, 46 Vt. 771; *Van Loan* v. *Village*, 60 N. W. Rep. 710. The insufficiency of the notice of the accident was a matter of law for the court. *Owens* v. *City*, 67 N. W. Rep. 281; *Salzer* v. *Milwaukee*, 73 N. W. Rep. 20. The object of the statute is to make it necessary for a claimant to inform the city council correctly as to the time when the injury occurred, place where and the cause of the injury. *Nichols* v. *Minneapolis*, 16 N. W. Rep. 410. The statute is mandatory and must be strictly pursued. *Gardner* v. *City*, 28 Atl. Rep. 42; *Crocker* v. *Hartford*, 34 Atl. Rep. 98; *Underhill* v. *Town*, 46 Vt. 771; *Christie* v. *Board*, 60 Cal. 164. Neither the allegations in the complaint nor the evidence justified the Court in submitting to the jury the question of damages for future suffering because of the injury. *McBride* v. *St. Paul*, 75 N. W. Rep. 231; *L'Herault* v. *Minneapolis*, 72 N. W. Rep. 73; *Comasky* v. *Ry. Co.*, 3 N. D. 276. The city was justified in waiting a reasonable time the action of its citizens in clearing the walks from snow. *Taylor* v. *Yonkers*, 105 N. Y. 202. The efforts made by the city officers to keep the streets in a reasonably safe and passable condition under the circumstances, were such as are required of such officers and the city is not liable as for negligence. *Burr* v. *Plymouth*, 48 Conn. 460; *Hayes* v. *Cambridge*, 136 Mass. 402; *Harrington* v. *City*, 121 N. Y. 147.

S. B. Bartlett and *Benton, Lovell & Bradley*, for respondent.

The street commissioner knew of the character of the obstruction immediately after the accident. *Owverson* v. *Grafton*, 5 N. D. 281, 65 N. W. Rep. 676; *Chacey* v. *Fargo*, 5 N. D. 173, 64 N. W. Rep. 932. Notice to the street commissioner is notice to the city. *Saylor* v. *City*, 39 Pac Rep. 653; *Patterson* v. *Austin*, 39 S. W. Rep. 976; *Powers* v. *Council Bluffs*, 50 Ia. 197. An application for a new trial on the ground of surprise should be viewed with caution and proof of surprise conclusively shown. *Gaines* v. *White*, 47 N. W. Rep. 524. A party failing to inform the Court of surprise and to apply for continuance because of surprise waives his right to object afterwards. *Turner* v. *Morrison*, 11 Cal. 21; *Washer* v. *White*, 16 Ind. 136; *Shellhous* v. *Ball*, 29 Cal. 608; *Dewey* v. *Frank*, 62 Cal. 343; *Bell* v. *Gardner*, 77 Ill. 319. The jury's verdict as to damages will not be disturbed unless unsupported by proof. *Halley* v. *Pelson*, 48 N. W. Rep. 219; *Taylor* v. *Jones*, 55 N. W. Rep. 593; *Franz Falk Brewing Co.* v. *Miclenz*, 37 N. W. Rep. 728. The fact that the injury was aggravated by disease does not require a specific instruction changing the measure of damages. *Stewart* v. *Ripon*, 38 Wis. 584; *Allison* v. *Chicago*, 42 Ia. 274; *Baltimore* v. *Kemp*, 61 Md. 74; *Jeffersonville* v. *Reilly*, 39 Ind. 568; *Houston* v. *Leslie*, 57 Tex. 83. The existence of the obstructed condition of the sidewalk for twelve or thirteen days before the accident was sufficient to show constructive notice. *Howe* v. *Lowell*, 101 Mass. 99; *Sheel* v. *Appleton*, 5 N. W. Rep. 27; *Scoville* v.

Salt Lake City, 39 Pac. Rep. 481; *Billings* v. *Worcester*, 102 Mass. 329; *Dooley* v. *Meridan*, 44 Conn. 117; *Pomfrey* v. *Saratoga Springs*, 104 N. Y. 459. It was neglect on the part of the defendant to permit accumulations of snow upon the sidewalk. *Wyman* v. *City*, 34 Atl. Rep. 621; *Koch* v. *Ashland*, 60 N. W. Rep. 990; *Huston* v. *Council Bluffs*, 69 N. W. Rep. 1130; *Adams* v. *Chicopee*, 18 N. E. Rep. 231; *City* v. *Niles*, 12 Pac. Rep. 632; *City* v. *Smith*, 45 N. W. Rep. 41; *City* v. *Cox*, 62 N. W. Rep. 66. The question as to whether the city used due diligence is settled by the jury's verdict. *Black* v. *Walker*, 7 N. D. 414, 75 N. W. Rep. 787; *Taylor* v. *Jones*, 3 N. D. 235. If the place be so described in the notice to the city that it can be identified with reasonable diligence, it is sufficient, and its sufficiency is not to be determined upon its merits alone but in the light of extraneous evidence of situation and surroundings. *City* v. *O'Brien*, 77 N. W. Rep. 76; *Hutchings* v. *Inhabitants*, 37 Atl. Rep. 883; *Cross* v. *City*, 33 N. Y. Supp. 947; *Steadman* v. *City*, 34 N. Y. Supp. 737; *City* v. *Barron*, 39 Pac. Rep. 989; *Werner* v. *City*, 28 N. Y. Supp. 226; *Hyme* v. *Village*, 58 N. Y. 413; *Laird* v. *Town*, 62 N. W. Rep. 1042; *Blackington* v. *Rockland*, 66 Me. 322; *Laue* v. *Madison*, 57 N. W. Rep. 93. Physical and mental pain, present and future, are proper elements of damage. 8 Am. & Eng. Enc. L (2d Ed.) 660 to 665; 1 South. Dam. (2d Ed.) §§ 419, 421.

BARTHOLOMEW, C. J. Action against a city to recover for personal injuries resulting from a fall occasioned by an alleged obstruction of snow and ice upon the sidewalk. Verdict for plaintiff, new trial denied, judgment upon the verdict, and defendant appeals. Section 2172, Rev. Codes, declares: "All claims against cities for damages or injury alleged to have arisen from the defective, unsafe, dangerous or obstructed condition of any street, crosswalk, sidewalk, culvert or bridge of any city, or from the negligence of the city authorities in respect to any such street, crosswalk, sidewalk, culvert or bridge, shall, within sixty days after the happening of such injury or damage, be presented to the mayor and common council of such city by a writing signed by the claimant and properly verified, describing the time, place, cause and extent of the damage or injury." The two following sections make a failure to give the notice as specified an absolute bar to any recovery. A notice was given in this case in due time. It located the obstruction, and consequent fall, upon the sidewalk "in front of the southwest corner of lot seven, block fifteen, First addition to the City of Casselton." Lot 7 is the southwest corner lot in said block. It faces west on Fifth avenue. Third street runs along the south side of lot 7. The notice therefore located the injury at the intersection of these thoroughfares at the southwest corner of said lot 7, and such was the wording of the original complaint. The undisputed testimony showed that the accident occurred at a point 100 feet north from said corner. At the close of her evidence, plaintiff, by her counsel, asked leave to amend her complaint, to

locate the obstruction and injury to correspond with the evidence. This was opposed by defendant upon the ground that it was a departure from the notice. The amendment was allowed. Defendant moved to dismiss the action upon the ground of the insufficiency of the notice, and also moved for a directed verdict upon the same ground. These motions were denied, and the Court instructed the jury as follows: "The question here for you to determine is whether the description in the notice was sufficiently accurate to warn the defendant of the locality of the injury, and thus permit it to take such action as the law would require in the premises. To determine this fact, you are to consider the evidence as to the premises, and the nearness or distance of the location, as given in the notice, to the exact place of the injury, and the probability whether the notice, given in the form it was, was sufficient to direct the defendant to the exact location of the injury. If it was not, then you must find for the defendant." To this instruction there was an exception. It will thus be seen that the defendant at all times raised the question of the legal sufficiency of the notice. It is defendant's contention that the sufficiency of the notice was, under the circumstances of the case, purely a question of law, and as matter of law the notice was insufficient. Defendant is clearly correct in both positions. It will be observed that there is no uncertainty or ambiguity in the notice concerning the place where the obstruction existed and the injury occurred. The language describes one place, and describes it so certainly that it necessarily excludes every other place. There is no room for construction, no room for doubt, no room for variation. Where the language used in the notice is of doubtful meaning, and honest minds might differ concerning it (*Carr* v. *Ashland,* 62 N. H. 665), or where the notice does not purport to locate the place with accuracy, but only generally as between different points (*City of Lincoln* v. *O'Brien* [Neb.] 77 N. W. Rep. 76), or including a considerable extent of highway (*Fopper* v. *Town of Wheatland,* 59 Wis. 623, 18 N. W. Rep. 514), or on a bridge of considerable length (*Lyman* v. *Hampshire Co.,* 138 Mass. 74), it may be proper, under appropriate instructions, to permit the jury to say whether or not the notice given, aided by the inquiries suggested by it, was sufficient to enable the city authorities, acting with reasonable diligence, to locate the point. It was doubtless a consideration of these cases that led the learned trial court to submit the matter to the jury in this case. But such cases can have no application here, for very obvious reasons. No question could arise as to what place the notice described, and intended to describe. In *Carr* v. *Ashland,* supra, the Court said: "Whether the exact place where it is claimed the damage was received is sufficiently designated in the notice is a preliminary question of law and fact to be determined by the Court." In *Law* v. *Fairfield,* 46 Vt. 425, a notice that plaintiff "had been injured on the road leading from Fairfield Center to East Fairfield" was held insufficient, as matter of law. In *Babcock*

v. *Guilford,* 47 Vt. 519, notice was held insufficient as to place as matter of law; also, in *Reed* v. *Calais,* 48 Vt. 7; *Bean* v. *Concord,* Id. 30; and *Holcomb* v. *Danby,* 51 Vt. 428. The case of *Learned* v. *Mayor, etc.* (Sup.) 48 N. Y. Supp. 142, is strictly in point. There the notice alleged that the injury was received on the sidewalk "immediately adjacent numbers 164 and 166, West One Hundred and Thirty-First street." The evidence disclosed that the injury was received in front of Nos. 264 and 266, West 131st street, or just one block distant from the point named in the notice. The trial court dismissed the action for insufficient notice, and plaintiff appealed. The Supreme Court said: "The notice was misleading, and such as the statute contemplated. To hold it sufficient would defeat the very object of the legislature, which was to protect the municipality from claims like the one made, by enabling its officials to examine the locus in quo without delay, obtain witnesses, and make diagrams or photographs of the place, to be used in case they determined that the claim ought to be resisted. The statute is mandatory that the notice shall state 'the time and place at which the injuries were received,' and that no action shall be maintained against the municipality unless such notice shall have been given; and such notice is in the nature of a condition precedent to the right of recovery. *Reining* v. *City of Buffalo,* 102 N. Y. 308, 6 N. E. Rep. 792; *Curry* v. *Same,* 135 N. Y. 366, 32 N. E. Rep. 80. Where the language of a statute is definite, and has a precise meaning, it must be presumed to declare the intention of the legislature, and it is not allowable to go elsewhere in search of conjecture to restrict or extend its meaning. *Johnson* v. *Railroad Co.,* 49 N. Y. 455; *People* v. *Supervisors of Greene,* 13 Abb. N. C. 421; *Cook* v. *Kelley,* 12 Abb. Prac. 35." In that case, also, the complaint correctly stated the locality, but the Court said: "A good complaint does not cure a defective notice, when the latter is the foundation upon which the right to maintain the action depends."

Respondent insists, however, that the notice stated that the injury was caused by an obstruction of ice and snow upon the sidewalk, and that such obstruction would locate the place. Under the holding in *Laird* v. *Town of Otsego,* 90 Wis. 25, 62 N. W. Rep. 1042; *Brown* v. *Town of Southburg,* 53 Conn. 212, 1 Atl. Rep. 819, and *McCabe* v. *City of Cambridge,* 134 Mass. 484, this would be true, if the notice were uncertain, and it appeared from the evidence that there was only one obstruction of ice and snow in that vicinity. Unfortunately for respondent, just the contrary appears. That section had been visited a few days earlier by a snowstorm of almost unprecedented extent and severity. Nearly all the sidewalks in the city were obstructed. Obstruction was then the rule, rather than the exception. But had the officers of the appellant, aided by the notice, sought to find the obstruction, they might with equal propriety have searched in any direction from "the southwest corner of said lot 7." Moreover, the notice was not given for nearly 60 days. Was it reasonable to suppose that an obstruction of snow

and ice could still be identified? But in fact the officers of appellant were under no obligation to go in search of an obstruction. The notice located the obstruction, definitely; and if, upon investigation, appellant learned that there was no obstruction at that point at the time of the alleged injury, it was warranted in concluding that respondent was mistaken as to the manner in which she had been injured. We are entirely clear that when respondent amended her complaint, alleging that the injury occurred 100 feet north of the point fixed by the notice, it became the duty of the Court to dismiss the complaint, by reason of the defective notice. That the statute requiring that the notice must state the place of the injury is mandatory, and that compliance therewith is a condition precedent to the maintenance of any action, have been often held. In addition to cases already cited, see *Underhill* v. *Town of Washington*, 46 Vt. 771, where it is said: "The statute is mandatory in form, and declares that no action [in this class of cases] shall hereafter be maintained in any court in this state, unless this preliminary act shall be done within the time specified. The place where the injury occurred is a cardinal and special requirement of the statute, and, if this requirement can be supplied by parol evidence, then may all, and the statute be annulled and utterly disregarded. We think parol evidence not admissable to supply a legal requirement of the written notice." In *Sowle* v. *City of Tomah*, 81 Wis. 353, 51 N. W. Rep. 572, it is said: "It is quite immaterial that some of the city officers were at the place of injury immediately after the accident, and knew precisely where it occurred. The statute does not provide that such knowledge or any other extraneous circumstances will dispense with the necessity of giving the prescribed notice. That must be given in every case coming within the terms of the statute, or the right of action is gone." The judgment of the District Court is reversed, and that court is directed to enter a judgment dismissing the complaint. Reversed. All concur.

(79 N. W. Rep. 1071.)

STATE OF NORTH DAKOTA *vs.* JOHN CRAWFORD.

Opinion filed October 7, 1899.

Burglary—Entry by Insertion of Instrument and Removal of Property.

In cases of burglary, where one and the same instrument is used both for the purpose of breaking and for the purpose of committing an ulterior crime within the building, it will suffice to show an entry by showing that the instrument so used was thrust into the building and was used in committing the ulterior offense, without showing that the accused entered the building in person.

Boring Holes in Granary with Auger Thus Causing Wheat to Escape Constitutes a Breaking and Entering.

The defendant was informed against for the crime of burglary in the third degree. The evidence tended to show that the defendant in the night time bored three holes with a two-inch auger through the walls of a granary, and into a mass of wheat stored therein. The weight of the grain forced several bushels of wheat to pass out of the aperture caused by the auger, which wheat, the evidence shows, was taken away and sold by the defendant. Upon this evidence the trial court directed the jury to acquit upon the ground that the evidence failed to show an entry into the granary. *Held,* that the ruling was error.

Evidence of Intent to Steal.

Held, further, that the intent to steal within the granary is sufficiently shown by the fact that the wheat which was stored inside of the granary was by defendant's agency transferred from the inside to the outside of the granary. It is true that the law of gravitation co-operated with the defendant in removing the wheat; but the defendant by his own act set the law in motion upon the inside of the building, and thereby accomplished his criminal purpose.

Appeal from District Court, Cass County; *Pollock,* J.

John Crawford was indicted for burglary in the third degree and acquitted by direction of the Court, and the state appeals.

Reversed.

Fred B. Morrill, state's attorney, (*Edward Engerud* of counsel) for appellants.

The appeal in this case is by the state pursuant to Subd. 5, § 8329, Rev. Codes. The boring of holes into a granary and thereby extracting grain therefrom is such a breaking and entering of the building as to constitute burglary. 2 Bish. New. Cr. L. § 92, Subd. 2 and 3; 2 Whart. Cr. L. § 1549, 1550. In England it was held that the sending of a child of tender years into a building to take property, was sufficient entry to constitute burglary by the person directing the deed. The point in issue was decided upon a statute defining burglary in the same language as our own. Rev. Codes, § 7406; *Walker* v. *State,* 63 Ala. 49, 35 Am. Rep. 1. Where the instrument used to do the breaking is insufficient to further aid in the commission of the crime; and is used only for the breaking and with no other purpose, the crime is not complete. Hughes. Case, 1 Leach C. C. 178 cited in *Walker* v. *State,* 35 Am. Rep. 3. But when the instrument is introduced for the purpose of taking the property, or for the purpose of both breaking and taking the property by one and the same act, the offense is complete. 4 Ala. 643; 39 Am. Dec. 314. Appellants second assignment of error, viz: "that the Court erred in releasing the defendant without bail pending appeal," depends upon the question whether respondent can again be tried for the same offense in the event of reversal. Secs. 8334, 8358 and 8350, Rev. Codes. But see Sec. 13, Const.

David R. Pierce, for respondent.

It is admitted that the proof establishes the boring by respondent of three auger holes through the side of the granary, below the surface line of the wheat therein contained, the same so communicating as to form one large hole through which the grain could escape. But this use of the instrument for making the break, in the absence of all evidence that the auger was introduced into the building for the purpose of aiding respondent in stealing within the building, is insufficient to show an entry. 2 Bish. New Cr. L. § 93; *Reg* v. *O'Brien*, 4 Cox. C. C. 398; *Rex* v. *Rust*, 1 Moody 183; *Rex* v *Hughes*, 1 Leach 183; 1 Roscoe's Cr. Ev. 366; 1 Hale's P. C. 555; 2 East P. C. 490; Hawk P. C. Bk. 1, Ch. 38, § 11. The entry must appear to have been made with the immediate intent to commit a felony as distinguished from the previous intent to procure admission. *State* v. *McCall*, 4 Laws Cr. Def. 855, 39 Am. Dec. 314; 1 Leach 452; 2 Arch. Cr. Pr. & Pl. 1084; Clark Cr. L. 235.

WALLIN, J. The record in this case shows that the defendant was charged with the crime of burglary in the third degree, by an information filed against him by the state's attorney of the county of Cass, and that the defendant pleaded not guilty to such charge, whereupon a trial was had. At the close of the testimony offered in behalf of the state, and on motion of counsel for the defendant, the trial court advised and practically directed a verdict of acquittal, and such verdict was accordingly returned. The defendant was then discharged from custody, despite the protest of the state's attorney, who requested the Court to hold the defendant to bail pending an appeal of the case in this Court. The state's attorney assigns as error the direction to acquit, and the refusal of the trial court to hold the accused to bail pending the appeal.

There is no conflict of evidence in the case, nor is there any dispute between counsel as to the facts. The evidence shows that at the time and place stated in the information there was a certain building used as a granary, in which there was stored in bins about 800 bushels of wheat, and that in the night time three holes were bored with a two-inch auger through the walls of the granary, and into one of the wheat bins. The three holes were so connected together as to make one large opening through the walls, and into the wheat bin. It further appears that there was a depression in the mass of wheat directly over the aperture made by the auger, indicating that wheat had passed out of the bin through such aperture to the amount of several bushels, and, further, that some wheat was spilled on the ground directly under the opening through the wall of the granary. Other evidence tended to connect the defendant with the felonious asportation and sale of the grain. Upon this evidence the question is presented whether the state had made out a prima facie case when the evidence closed and the state rested its case. Defendant's counsel contends that the state had failed to establish two of the three essential elements of the crime charged, viz: the entry into the granary, and the intent to steal therein. In support of this theory, attention is called to the evidence which

clearly indicates how the grain was extracted from the granary, and negatives the idea that the person who bored the holes through the walls went inside the building to steal therein, or for any purpose whatever. Nor is it claimed in behalf of the state that the accused personally went inside the granary for any purpose. As to the intent to steal inside the granary, the evidence, in our judgment, leaves no room for doubt. The accomplished fact clearly reveals the motive and purpose with which the act was done. The wheat was stored within the granary, and the evidence tends to show that the same was by the acts and agency of the accused taken possession of while in the granary, and removed from the inside of the granary to the outside, and was thereafter taken away from the premises in the night time. The defendant, under the evidence, acquired dominion over the grain taken while the same was within the building, and his intention to do so is too clear for discussion. It is true that the accused was aided by natural laws in taking possession of the grain within the granary, but such laws were deliberately invoked and set in motion by the acts of the defendant, done by his agency operating within the building.

But counsel most strenuously contends that inasmuch as the evidence shows that the grain was removed through the opening made with an auger, and not otherwise, it therefore appears affirmatively that the defendant did not and could not have gone into the building, and hence that the state failed to establish the essential element of an entry. We cannot accept this conclusion from the evidence. It is manifest that the auger guided by the person who bored the holes passed through the walls of the granary into the mass of wheat therein, and also manifest that it was the auger operating within the building which set the law of gravitation in motion, and thereby enabled the man guiding the auger to remove the property from within the building to the outside. Using the auger for the double purpose of breaking and taking possession of the property within the building brings the case within the rule announced in the authorities hereafter cited. We quote first from the authorities cited by defendant's counsel. The rule is expressed in Bishop's New Criminal Law (volume 2, § 93) as follows: "And there is no burglary if simply the tool used for breaking goes in, and neither any part of the person nor the instrument by which the ulterior felony is to be perpetrated does." The same section contains the following language: "Thus, to raise a window by placing the hands outside of it, and then thrust in a bar for forcing open the inside shutter, or to make a hole through a door with a centerbit, whereby some of the chips fall in, is insufficient, because neither the bar nor the centerbit was to be employed about the ulterior felony." Another text writer cited by defendant's counsel puts the rule as follows: "Whether the introduction of an instrument will be such an entry as to constitute burglary depends upon the object with which the instrument is employed. Thus, if the instrument be employed, not merely for the purpose of making the entry, but for the purpose of

committing the contemplated felony; as where a man puts a hook or other instrument to steal, or a pistol to kill, through a window, though his hand is not in, this is an entry. See 1 Rosc. Cr. Ev. *366, citing other authority. The rule as announced in these authorities seems to be well established, and generally acquiesced in without dissent; and as, in our judgment, it applies to the facts of this case, it will govern our decision. As has been seen, we hold, under the evidence, that the auger was used first in breaking, and again deliberately used for the purpose of committing the ulterior crime of stealing wheat within the granary, thereby constituting an entry, within the rule. Counsel for the state has cited extracts from other text writers, but we deem it unnecessary to quote them in support of a rule so well established. The case of *Walker* v. *State*, 63 Ala. 49, is directly in point. In that case the crime charged was burglary, and it was committed by boring a hole with an auger into a granary in which grain was kept, and by this means the grain was removed from the granary. In the course of the opinion the Court used the following language: "When one instrument is employed to break, and is without capacity to aid otherwise than by opening a way of entry, and another instrument must be used, or the instrument used in the breaking must be used in some other way or manner to consummate the criminal intent, the intrusion of the instrument is not of itself an entry. But when, as in this case, the instrument is employed not only to break but to effect the only entry contemplated or necessary to the consummation of the criminal intent; when it is intruded within the house, breaking it, effecting an entry, enabling the person introducing it to consummate his intent,—the offense is complete. The instrument was employed not only for the purpose of breaking the house, but to effect the larceny intended. When it was intruded into the crib, the burglar acquired dominion over the corn intended to be stolen. Such dominion did not require any other act on his part. When the auger was withdrawn from the aperture made with it, the corn ran into the sack he used in its asportation. There was a breaking and entry, enabling him to effect his criminal intent without the use of any other means, and this satisfies the requirements of the law." This case seems to us not only to be intrinsically sound in legal principle, but one which apparently is sustained by the unanimous voice of authority upon the question. The order directing an acquittal will be reversed upon the ground that it was error to hold that the evidence did not tend to establish an entry. The case should have been submitted to the jury with proper instructions upon the matter of the entry, as well as upon the other legal aspects of the case.

We are of the opinion that this Court cannot properly consider the other assignment of error, viz: that predicated upon the refusal of the trial court to hold the accused to bail pending an appeal from the order directing an aquittal. Such refusal occurred after the order appealed from was made, and the same is in no manner connected

with the merits of the order from which an appeal is taken. All the judges concurring.
(80 N. W. Rep. 193.)

B. E. INGWALDSON *vs.* J. P. SKRIVSETH.

Opinion filed October 7, 1899.

Costs of Printing Brief and Abstract Disallowed.

This action was brought to obtain equitable relief, and the amount of the judgment recovered was less than $300. Upon a former appeal to this Court the successful party disbursed $96.80 in printing an additional abstract and brief, and this disbursement was allowed, and taxed by the trial court against proper objection thereto. *Held*, following Black v. Elevator Co. 8 N. D. 96, that said disbursement was unnecessary, and hence its allowance by the court below was error.

Modification of Judgment Disallowed.

Plaintiff's application to modify the language of the judgment upon the merits in such a way as to correct an alleged mistake is denied for reasons stated in the opinion.

Appeal from District Court, Traill County; *Fisk*, J.

Action by B. E. Ingwaldson, as trustee, against J. P. Skrivseth and wife. From an order affirming a taxation of costs by the clerk, plaintiff appeals.

Modified.

B. E. Ingwaldson, pro se.

Carmody & Leslie, for respondents.

WALLIN, J. Upon a former appeal of this action the respondents were successful, and this Court therein directed that the judgment of the court below in respondents' favor should be affirmed. 7 N. D. 388, 75 N. W. Rep. 772. In said former appeal the respondents printed an additional abstract and brief, and in so doing disbursed $96.80. Against objection made by the plaintiff, the said amount was taxed and allowed by the clerk of the District Court as a disbursement. This action of the clerk was, by proper proceedings, taken into the District Court for review, and that court, after hearing counsel, entered an order affirming the action of the clerk, and directing that the costs as taxed by him should be allowed, and incorporated in the judgment. To this order plaintiff saved an exception. Plaintiff appeals to this Court from such order, and from the judgment entered pursuant thereto.

The principal question presented for determination is whether the disbursements in question were lawfully taxed and allowed as a part of the respondents' disbursements in the action. This question must receive a negative answer. The case at bar must be governed by the rule announced by this Court in *Black* v. *Elevator*

Co., 8 N. D. 96, 76 N. W. Rep. 984. Chapter 38, Laws 1897, construed in the case cited, is explicit, and to the effect that, whether the action is legal or equitable in its nature, no printed abstracts or briefs shall be required of either party in any case where the amount of the judgment appealed from does not exceed $300. The case at bar is strictly an action for equitable relief, and the judgment does not exceed the amount of $300; hence the expense of printing the abstract and brief was, however convenient, not a necessary disbursement in the action, and therefore cannot be taxed or allowed.

The appellant also seeks on this appeal to have the phraseology of the judgment entered below so modified as to correct an alleged mistake in the same. We think the judgment as entered, when read and considered as a whole, expresses the nature and extent of the relief intended to be granted with reasonable clearness. If, however, counsel is of a different opinion, application can be made to the District Court for relief by motion, and that is the proper course where it is sought to correct a mere irregularity in the entry of the judgment. See *Gaar-Scott & Co.* v. *Spaulding*, 2 N. D. 414, 51 N. W. Rep. 867. Whether such application in this case is now too late is a point upon which we need express no opinion. The judgment of the trial court will be modified by striking therefrom $96.80, the amount of said disbursements for printing. Plaintiff will recover costs and disbursements on this appeal. All the judges concurring.

(80 N. W. Rep. 475.)

STATE OF NORTH DAKOTA *vs.* CHARLES CURRIE.

Opinion filed October 21, 1899.

Election Day for Township Officers is not a Legal Holiday.

The first Tuesday in March, being the day upon which under the statute civil townships hold their annual township meetings, and, among other things, elect township officers, is not a legal holiday.

Burden of Proof on Defendant to Show that Malt Liquor is not Intoxicating.

Where, in a prosecution under the prohibition law, the evidence tended to show the sale and keeping for sale of beer, it was proper for the Court to instruct the jury that beer was a malt liquor, and intoxicating, and that, if defendant claimed the beer he sold or kept on sale was not intoxicating, the burden was upon him to so show.

Instructions Approved.

Instructions further examined, and *held* correct when construed together, and not prejudicial to defendant.

Appeal from District Court, Walsh County; *Pollock*, J.

Charles Currie was convicted of maintaining a liquor nuisance, and appeals.

Affirmed.

De Puy & De Puy, for appellant.

The Court was without jurisdiction to try the defendant on a legal holiday, viz: the day for holding annual township meetings. §§ 5124, 2540, Rev. Codes. It was error for the Court to instruct the jury that beer is intoxicating and that the burden was on defendant to show that the beer sold was non-intoxicating. It is not within the power of the legislature to say that non-intoxicating beers are intoxicating. There are both intoxicating and non-intoxicating beers. *State* v. *Sioux Falls Brewing Co.*, 5 S. D. 39, 58 N. W. Rep. 1. The legislative declaration that courts will take judicial notice that beer is a malt liquor and intoxicating; Subd. 25, § 10, Ch. 65, Laws 1897, does not make beer intoxicating. The power of judicial notice is to be exercised with caution. Any doubt is resolved against it. 12 A. & E. Enc. L. 152; *Brown* v. *Piper*, 91 U. S. 37. In criminal cases the state has the affirmative, and the burden of establishing every necessary element of the charge never shifts. 5 A. & E. Enc. L. (2d Ed.) 33.

Jeff M. Meyers, state's attorney, for respondent.

Construing §§ 5124 and 477, Rev. Codes, together and it is plain that the election "held throughout the state" mentioned in § 5124 is the general election provided for in § 477, Rev. Codes. Only a portion of the state is organized under the civil township law, hence it cannot be said that township elections are held throughout the state. For evidentiary purposes, by statute, beer is a malt liquor and intoxicating. Sub. 25, § 10, Ch. 65, Laws 1897. No evidence need be given of facts of which the Court will take judicial notice. § 1, Ch. 65, Laws 1897. The law of evidence being a part of the remedy the legislature has power to provide what shall constitute prima facie evidence of the facts in issue. 11 Am. & Eng. Enc. L. (2d Ed.) 550-551; Cooley's Const. Lim. 349-450; 3 Rice Cr. Ev. 38; *Hand* v. *Ballou*, 12 N. Y. 543; *Peo.* v. *Mitchell*, 45 Barb. 212; *Hickox* v. *Tallman*, 38 Barb. 608; *Howard* v. *Moot*, 64 N. Y. 262; *Com.* v. *Williams*, 6 Gray, 1; *Com.* v. *Kimball*, 24 Pick 373, 35 Am. Dec. 326; *Com.* v. *Rowe*, 14 Gray 47; *Com.* v. *McKie*, 1 Gray 61, 61 Am. Dec. 410; *Holmes* v. *Hunt*, 122 Mass. 505; 23 Am. Repts. 381; *State* v. *Beach*, 43 N. E. Rep. 949; *Com.* v. *Smith*, 44 N. E. Rep. 503; *State* v. *Kyle*, 45 Pac. Rep. 147. In the absence of such a statute beer would be presumed to be a malt liquor and intoxicating. Black on Intoxicating Liquors, § 17; 3 Am. & Eng. Enc. L. (2d Ed.) 906; *Kerkow* v. *Bauer*, 18 N. W. Rep. 27; *Briffitt* v. *State*, 16 N. W. Rep. 39; *Maier* v. *State*, 21 S. W. Rep. 974; *State* v. *Dick*, 50 N. W. Rep. 362; *Hollender* v. *Magone*, 38 Fed. Rep. 912; *U. S.* v. *Ducournau*, 54 Fed. Rep. 138; *State* v. *Jenkins*, 4 Pac. Rep. 809; *Myers* v. *State*, 93 Ind. 251. The evidence is clearly sufficient to sustain the verdict, no injury, therefore could result to defendant by reason of the alleged errors in the charge. *Wooten* v. *State*, 5 South. Rep. 39; *Robinson* v. *State*, 9 S. E. Rep. 528; *Johnston* v. *State*, 10 South. Rep. 686; *Zimm* v. *Peo.* 111 Ill. 49; *Siberry* v. *State*, 47 N. E. Rep. 458;

Berry v. *State*, 31 Ohio St. 225; 2 Enc. Pl. & Pr. 567. The court's instructions as a whole are substantially correct, a reversal will not follow error in a detached phrase under such circumstances. *U. S.* v. *Adams*, 2 Dak. 305, 9 N. W. Rep. 718; *State* v. *Brennan*, 2 S. D. 384, 50 N. W. Rep. 625; *Peo.* v. *Kernaghan*, 14 Pac. Rep. 566; *Peo.* v. *Flynn*, 15 Pac. Rep. 102; *Peo.* v. *Lee Chuck*, 20 Pac. Rep. 719; *Spies* v. *Peo.* 12 N. E. Rep. 865; 2 Enc. Pl. & Pr. 578.

BARTHOLOMEW, C. J. The defendant has been informed against, tried, convicted, and sentenced for the offense of keeping and maintaining a common nuisance. The state's attorney moved the case for trial on the first Tuesday in March, 1899. The defendant objected to going to trial on that day on the ground that it was a legal holiday. Sec. 5124, Rev. Codes, declares every day to be a holiday "on which an election is held throughout the state." Section 2540, Id., reads: "The citizens of the several townships of this state qualified to vote at general elections shall annually assemble and hold township meetings in their respective townships on the first Tuesday of March, at such place in each township as the electors thereof at their annual township meetings, from time to time, appoint." We do not think the first Tuesday in March is a legal holiday. The statute provides for township meetings on that day for the purpose of transacting a large amount of business, varied in its character, and including the selection of township officers. The statute nowhere speaks of it as an election, but always as a township meeting. Again, if an election, it is not held "throughout the state." Many portions of the state are not organized as civil townships, and all incorporated cities must be excluded therefrom. There was no error in overruling defendant's objection.

There was abundant evidence that defendant kept a place where beer was habitually sold as a beverage. The state did not attempt to prove that this beer was intoxicating, but the Court instructed the jury that beer was a malt liquor, and was intoxicating, and that, if the defendant claimed that the beer he sold was not intoxicating, the burden was upon him to so show. This is specified as error. We think it correctly states the law. "Beer," as the word is generally used and understood, is a malt liquor, and is intoxicating. There are, however, some light non-intoxicant preparations sometimes vended under that name. It was nearly always embarassing to the prosecution to prove that the beer that formed the subject of a particular sale was intoxicating, for the reason that a moderate quantity of malted beer can be taken without intoxication. Our statute—as we think, very properly—removed this embarrassment. Among the things of which, under section 10, Ch. 65, Laws 1897, a Court is required to take judicial knowledge, we find, "That beer is a malt liquor and is intoxicating." This infringes no rights of an accused party. True, as counsel argues, the legislature cannot make a non-intoxicant intoxicating by declaring it to be so. But it can say what quantum of proof shall raise a presumption that an article is intoxicating, and leave the accused at liberty to rebut the

presumption if he can. The law raises a presumption of guilt as against a person who is found in the unexplained possession of stolen property soon after the theft, and throws upon him the burden of showing the lawful character of his possession. But it was never suggested that this required the accused to prove his innocence. We may add that in many jurisdictions courts take judicial notice that beer is intoxicating, in the absence of any statute so requiring. Black. Intox. Liq. § 17; 3 Am. & Eng. Enc. L. (2d Ed.) 906.

A vigorous assault is made upon the last paragraph in the charge. After the Court had fully and fairly stated the law, it said: "That is all there is in this case, gentlemen of the jury. If you believe from the evidence in this case that the defendant is not guilty, that he has not kept this place, that he has not sold this liquor, then it is your duty, under your oaths as jurors, to find this defendant not guilty. It is equally your duty, if you believe this defendant to be guilty, to say so by your verdict." Stress is laid upon the point that the Court failed to use the words "beyond a reasonable doubt" in charging the jury that it would be their duty if they believed the defendant to be guilty to say so by their verdict. But the Court, at two different places in the charge, fully explained the matter of reasonable doubt. Immediately preceding the quotation, the jury had been told that it "must have the highest kind of proof in order to convict," and a reasonable doubt had been correctly defined. It may be that the language objected to might have been improved, but, read in connection with what preceded it, the jury could not have been in the least embarrassed or misled. We find no error in the record. Affirmed. All concur.

(80 N. W. Rep. 475.)

STATE OF NORTH DAKOTA *vs.* JOSEPH ROZUM.

Opinion filed October 21, 1899.

Preliminary Examination—Sufficiency of Complaint—Waiver.

A complaint filed with a committing magistrate, charging the crime of keeping and maintaining a common nuisance, fixed the locus as "in a certain frame building situate on the townsite of Pisek," in the proper county and state. The accused waived an examination, and was bound over to the District Court. An information was filed against him in that court, which he moved to quash on the ground that he had never had or waived a preliminary examination for any criminal offense, because no place was fixed and particularly described in the complaint filed with the magistrate. *Held* that, in the absence of an attack thereon by motion or demurrer, the allegation in the complaint was sufficient, and that said complaint did state a public offense.

Particularity of Description of Place where Intoxicating Liquors are Sold.

Held, further, that the statutory requirement that the place be particularly described applies only to cases of search and seizure, or to trials upon indictment or information for keeping and maintaining

a common nuisance. It does not extend to a complaint for that offense before a committing magistrate.

Second Offense—Maintaining Nuisance—Motion to Quash Information.

In the information in District Court the defendant was charged with keeping and maintaining a common nuisance, as of a second offense. The motion to quash was also based upon the claim that defendant had never had or waived a preliminary examination for the particular offense charged in the information. *Held*, that in this state an accused has only such right to a preliminary examination as is given by statute, and that under section 7983, Rev. Codes, the accused may be informed against for any crime covered by the transaction set forth in the complaint, or necessarily connected therewith, or of which the accused knew he must be guilty, if guilty of the matter charged in the complaint.

Verification on Information and Belief—When Sufficient.

Section 7601, Rev. Codes, requires that where a state's attorney makes complaint of violations of the prohibition law, verified on information and belief, he must file with the magistrate the depositions of some witness on which such information is based. In this case such deposition was attached to the complaint when handed to the magistrate. The complaint was marked, "Filed"; the deposition was not. *Held* a sufficient compliance with the statute.

Order of Commitment—When Sufficient to give District Court Jurisdiction.

Section 7966, Rev. Codes, requires a committing magistrate to indorse his order of commitment on the complaint. It was not so indorsed in this case, but was entered upon the docket which the law requires the magistrate to keep, and a copy of which must be returned to the District Court. *Held* sufficient. It is the making of the order that gives the District Court jurisdiction, and not the place of its entry.

Evidence—Threats to Suppress.

Threats made for the purpose of destroying or withholding evidence raise a presumption that such evidence is detrimental to the party seeking to destroy or withhold it, and such threats may be given in evidence.

Cross Examination of Defendant—Collateral Crimes.

It is settled in this state that, where a defendant in a criminal case voluntarily goes upon the witness stand in his own behalf, he is, on cross-examination, subject to the same rules that govern as to other witnesses, and may, as affecting his credibility, be asked as to collateral crimes, even when his answer may disgrace him in the eyes of the jury.

Maintaining Liquor Nuisance in Home.

Where a husband knowingly suffers intoxicating liquors to be kept for sale or sold as a beverage in the house in which he lives with his family, or knowingly suffers persons to resort to such house for the purpose of drinking intoxicating liquors, contrary to law, he, in law, assents thereto, and is guilty of keeping and maintaining a common nuisance; and the fact that the title to the home may be in the wife, and that she furnishes and sells the intoxicating liquors, will not relieve him of guilt.

Appeal from District Court, Walsh County; *Sauter*, J.

Joseph Rozum was convicted of keeping and maintaining a common nuisance, and appeals.

Affirmed.

Spencer & Sinkler, for appellant.

The information laid before the committing magistrate was insufficient because it did not particularly describe the place where the liquor was kept. §§ 7601, 7602 and 7614, Rev. Codes. The information before the committing magistrate not stating a public offense there is no base upon which to rest the information upon which defendant was convicted. Every element of the offense defined by the statute must be covered in the information by positive averment. *State* v. *Burchard*, 4 S. D. 548, 57 N. W. Rep. 491; *State* v. *Butcher*, 1 S. D. 401, 47 N. W. Rep. 406; *State* v. *Markuson*, 7 N. D. 155, 73 N. W. Rep. 82; *Rogers* v. *State*, 33 Atl. Rep. 283. Section 7614, Rev. Codes, is identical with the Kansas statute on the same subject and in that state a particular description of the place is required. *City* v. *Smith*, 46 Pac. Rep. 710; *State* v. *Nickerson*, 2 Pac. Rep. 654; *State* v. *Walters*, 47 Pac. Rep. 839. If from the preliminary proceedings no crime can be culled the state's attorney cannot file an information for any crime. § 7982, Rev. Codes; *State* v. *Jarrett*, 27 Pac. Rep. 146; *Peo.* v. *Parker*, 27 Pac. Rep. 537; *Peo.* v. *Wallace*, 29 Pac. Rep. 950; *Orr* v. *State*, 8 S. W. Rep. 644; *Smith* v. *State*, 8 S. W. Rep. 645; *Wood* v. *State*, 11 S. W. Rep. 525; *Peo.* v. *Kilvington*, 36 Pac. Rep. 13; *Peo.* v. *Lane*, 36 Pac. Rep. 16; *State* v. *Ivey*, 5 S. E. Rep. 407; *Ex parte Baker*, 25 Pac. Rep. 966; *Peo.* v. *Christian*, 35 Pac. Rep. 1043; *Peo.* v. *Howland*, 44 Pac. Rep. 342; *White* v. *State*, 35 S. W. Rep. 391; *Dominguez* v. *State*, 35 Pac. Rep. 973; *Paschal* v. *State*, 9 Tex. App. 205; *Lackey* v. *State*, 14 Tex. App. 167 *State* v. *Beebee*, 83 Ind. 171; *Little* v. *State*, 19 S. W. Rep. 332. The offense charged in the information before the committing magistrate if any, was a misdemeanor, while the information on which he was tried was felony. An information for felony cannot be based on a complaint for a misdemeanor. *Kinley* v. *State*, 16 S. W. Rep. 339. The fact of the former conviction should have been alleged in the complaint before the examining magistrate. § 7614, Rev. Codes; Clark's Cr. L. 35 & 36; Clark's Cr. Pro. 204; *Peo.* v. *Buck*, 67 N. W. Rep. 982; *Com.* v. *Harrington*, 130 Mass. 35; Beale's Cases on Cr. L. 31. The District Court acquired no jurisdiction to try this defendant because the information filed by the state's attorney was verified on information and belief, and the statements of the witnesses examined by him were not filed therewith. § 7601, Rev. Codes; *State* v. *Huffman*, 33 Pac. Rep. 377. Except as provided by statute no person should be arrested save upon a positive oath to the complaint. *State* v. *Kirkpatrick*, 34 Pac. Rep. 415; *State* v. *Mosell*, 30 Pac. Rep. 189. There is no indorsement of committment on the complaint as required. § 7966, Rev. Codes; *Peo.* v. *Thompson*, 24 Pac. Rep. 384. It was not competent to ask either the observation or opinion of witnesses either as to the disposition of the accused, or as to his conduct. Abbott's Cr. Brief, § 468 and cases cited. Neither was it competent to show defendant's bad character by proof of specific acts. *State* v. *LaPage*, 57 N. H. 245; *Com.* v. *O'Brien*, 119 Mass. 342; *Hayward* v. *Peo.* 96 Ill. 492.

Neither can the people offer evidence tending to show defendant guilty of an independent crime. *Peo.* v. *Greenwall,* 108 N. Y. 296; *Peo.* v. *Whiteman,* 46 Pac. Rep. 92; *Ryan* v. *Peo.* 79 N. Y. 594; *Peo.* v. *Brown,* 79 N. Y. 571. Nor can they inquire of defendant on cross-examination. *Clark* v. *State,* 78 Ala. 474. The information accused defendant of keeping and maintaining a nuisance, the evidence disclosed that his wife was running the place. The question should have been submitted to the jury as requested by defendant as to whether defendant intentionally allowed or permitted his wife to keep the place. *Peo.* v. *Utter,* 44 Barb. 170; *Com.* v. *Hill,* 145 Mass. 305; 6 Lawson's Cl. Def. 762; *Fanny* v. *State,* 2 Blackf. 484.

Jeff M. Meyers, state's attorney, for respondent.

The information before the magistrate alleges a statutory offense in the language of the statute; this is allthat is required. 10 Enc. Pl. & Pr. 483, n. 2. In most states where a similar statutory offense exists it is not necessary in the information or indictment to particularly describe the place constituting the nuisance. Black on Intox. Liqs. § 486; *Com.* v. *Rhodes,* 19 N. E. Rep. 22; *Com.* v. *Quinlan,* 27 N. E. Rep. 8; *Skinner* v. *State,* 22 N. E. Rep. 115; *State* v. *Hoard,* 23 N. E. Rep. 972; *State* v. *Welch,* 7 Atl. Rep. 475; *State* v. *Hall,* 11 Atl. Rep. 181; *State* v. *Walsh,* 38 N. W. Rep. 494; *Nicholson* v. *Peo.* 29 Ill. App. 57. This pleading fulfills strictly all the requirements of our code as to a criminal complaint. §§ 7886, 7881, Rev. Codes. It satisfies the rule with respect to such pleadings heretofore laid down by this Court. *State* v. *Barnes,* 3 N. D. 131-136, 54 N. W. Rep. 541. Sections 7601-2, Rev. Codes, do not enact any rule for pleading an offense under the statute. Section 7614, Rev. Codes, does not abridge the rule so far as it applies to pleadings otherwise than upon actual trial. The word "prosecution" in this statute is synonymous with the word "action." § 5156, Revised Codes. A proceeding before a magistrate is to determine whether the party shall be held to await future "prosecution." It is a complete independent judicial investigation similar to that made by a grand jury. *State* v. *Hasledahl,* 3 N. D. 36, 53 N. W. Rep. 430. Proceedings before a grand jury are in no proper sense a part of a "prosecution". *State* v. *Walcott,* 21 Conn. 297. For the sense in which the word "prosecution" is used in the statute, see §§ 7745, 7979, Rev. Codes; Sec. 8, Const. *Shulte* v. *Keokuk Co.* 39 N. W. Rep. 376. There is ample authority in the statute for the filing of an information for a different offense than that described in the complaint before the magistrate. § 7983, Rev. Codes. A preliminary examination is not essential to "due process of law." 1 Bish. Cr. Pro. 239, a; *State* v. *Anderson,* 30 La. Ann. 557; *State* v. *Brett,* 40 Pac. Rep. 873; *State* v. *McGilvery,* 55 Pac. Rep. 115; *Holt* v. *Peo.* 45 Pac. Rep. 374; *State* v. *Sureties,* 34 Pac. Rep. 3. It is the state's attorney who is required to file the statement of witnesses with his

information. § 7601, Rev. Codes. He deposited them attached together with the magistrate, this was a filing by the state's attorney and satisfies the statute. 7 Am. & Eng. Enc. L. 960; *Harris* v. *Watkins,* 5 Dak. 374, 40 N. W. Rep. 536. It is the order indorsed by the magistrate over his signature upon the complaint as provided in § 7966 and returned as provided in § 7978, Rev. Codes, that confers jurisdiction upon the District Court to entertain the prosecution. 16 Enc. Pl. & Pr. 863; *Peo.* v. *Tarbox,* 46 Pac. Rep. 896; *Peo.* v. *Wallace,* 29 Pac. Rep. 950. The indorsement was not made on the complaint in this case but the order was entered by the justice in his docket. *Peo.* v. *Wallace,* 29 Pac. Rep. 950; *Peo.* v. *Clark,* 35 Pac. Rep. 710; *Peo.* v. *Tarbox,* 46 Pac. Rep. 396. The evidence challenged was properly received. *State* v. *Kent,* 5 N. D. 516, 67 N. W. Rep. 1052; *Snell* v. *Bray,* 14 N. W. 14; *Carpenter* v. *Wiley,* 26 Atl. Rep. 488; 3 Rice, Ev. 29; *Kirkaldie* v. *Paige,* 17 Vt. 256; *Rand* v. *State,* 53 N. W. Rep. 836; *State* v. *Howell,* 23 S. W. Rep. 263; *Russell* v. *State,* 44 S. W. Rep. 159; *State* v. *Taylor,* 22 S. W. Rep. 806; *Jameson* v. *Peo.* 34 N. E. Rep. 486; *Horn* v. *State,* 15 South. Rep. 278; *Anderson* v. *State,* 46 N. E. Rep. 971. It is the keeper of the common nuisance who is punishable. § 7605, Rev. Codes. The husband is the keeper of the home. § 2764, Rev. Codes. And is guilty of the acts constituting the nuisance when done with his knowledge and consent. 1 Bish Cr. Law, 654; *Com.* v. *Woods,* 97 Mass. 224; *Com.* v. *Carroll,* 124 Mass. 30; *Hunter* v. *State,* 43 N. E. Rep. 452; 9 Am. & Eng. Enc. L. (2d Ed.) 531; Black on Intox. Liqs. § 374.

BARTHOLOMEW, C. J. The defendant has been convicted of the crime of keeping and maintaining a common nuisance, as a second offense, and has been sentenced to imprisonment in the penitentiary. He appeals from the judgment.

In his first assignment of error he urges that he has never had or waived a preliminary examination for the offense for which he was convicted or for any offense. The facts are that a complaint against the defendant, attempting to set out the offense of keeping and maintaining a nuisance, was filed by the proper state's attorney before a committing magistrate, and a warrant issued thereon. Defendant was arrested under the warrant, and, by proceedings in all respects regular, waived an examination, and was bound over to the District Court. It is now urged that the complaint before the magistrate did not set forth any public offense, in that it did not particularly describe the place where the alleged nuisance was maintained. The language of the complaint is, "in a certain frame building situate on the townsite of Pisek," in the proper county and state. No other attack is made upon the complaint. In *State* v. *Barnes,* 3 N. D. 135, 54 N. W. Rep. 542, this Court said: "We know of no case or principle of law which requires that a complaint made as a basis for a mere preliminary examination should be drawn with the fullness and technical accuracy required in cases where the prisoner is put upon his trial in a court

having authority to hear and determine the case and impose a final judgment. The system of criminal procedure which is established by the laws of this state contemplates that non-professional persons, and particularly justices of the peace, who, as a rule, are men unlearned in the abstruse rules of criminal pleading, may have frequent occasion to write out criminal complaints, to be filed as a basis for the arrest of offenders. To require of persons who are without professional training to frame criminal complaints with the same degree of technical accuracy which is required in indictments and informations would be to exact the impossible. No such rule has hitherto existed, and this Court will not lend its sanction to such a notion." And again it was said: "We hold that a complaint, after stating time and place, which names or describes an offense in general terms, and which, in addition thereto, sets out such facts and circumstances of the offense as will fairly apprise a person of average intelligence of the nature and cause of the accusation against him, will be sufficient, as a basis of an examination, even in cases where other averments, not inserted in such complaint, would be essential to a valid information charging the same offense." The language there used would ordinarily control a case when the defect was one of form and not one of substance. The defendant was fairly apprised of the nature and cause of the accusation against him. Indeed, so far as the complaint shows, there may have been but the one building on the townsite, and the description may have been such that the defendant could not be in doubt. But the defendant urges that nothing less than absolute accuracy of description will suffice in this case. We are cited to sections 7601, 7602, Rev. Codes, each of which requires the complaint to "particularly describe" the place. But it is so clear to us that these sections, in speaking of place, have reference only to the search and seizure of property, that we need not discuss them. But section 7614, also relied upon, declares: "In prosecutions under this chapter by indictment or otherwise, it shall not be necessary to state the kind or quantity of liquor sold or kept for sale, and shall not be necessary to describe the place where sold or kept for sale, except in prosecutions for keeping and maintaining a common nuisance." It will be noticed that this section simply requires the place to be described. The particular description is not, in terms, demanded. But we may concede that the description in the complaint would be insufficient in an indictment or information for the alleged offense if attacked. The section says, "In prosecutions under this chapter by indictment or otherwise." What is meant by "prosecutions"? In a sense, the making of a complaint for the purpose of procuring a warrant of arrest upon preliminary examination is a prosecution. Should such complaint be made maliciously and without probable cause, the complainant might be liable for malicious prosecution. But we do not think the legislature intended any such meaning in this instance. Black's Law Dictionary thus defines the word: "Prosecutions. In criminal

law. A criminal action; a proceeding constituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person charged with a crime." And this definition is in entire harmony with our statute Section 5156, Rev. Codes, reads: "An action is an ordinary proceeding in a court of justice, by which a party prosecutes another party for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense." In other words, a proceeding by which a party is prosecuted for the punishment of a public offense is an action. Prior to the adoption of our constitution all criminal actions triable in courts of record were, in this jurisdiction, based upon indictments. The constitution (sec. 8) gave the legislature power to change the law in that respect. But the law known as the "Prohibition Law," section 22 of which is identical with section 7614, Rev. Codes, was approved on December 19, 1889. At that time the grand jury system had not been modified, and prosecutions by information introduced. But under the constitution the legislature had power so to do. This fact explains the wording of the section. It says, "In prosecutions under this chapter by indictment or otherwise." This word "otherwise" simply meant by such other process as the legislature might substitute for the indictment, and in no manner referred to proceedings on preliminary examination. This leads to the conclusion that the complaint did, for the purposes of a preliminary examination, state a public offense, and consequently the defendant had or waived an examination for a public offense.

The next assignment urged is more important. The complaint at the preliminary examination charged the defendant with keeping and maintaining a common nuisance, and for that offense he was placed under bonds for his appearance in District Court. For this offense the punishment could not exceed imprisonment in the county jail for one year and a fine of $1,000. The offense is a misdemeanor. In the District Court the defendant was informed against for keeping and maintaining a common nuisance as of a second offense. For this offense the punishment cannot be less than confinement in the penitentiary for one year, and may be for two. The offense is a felony. Counsel for the defendant urge that the defendant has never had or waived a preliminary examination for the offense charged in the information, and that the state's attorney was without authority to file an information against defendant for an offense for which he had not had or waived a preliminary examination, and for which he had not been recognized to appear in District Court. We notice first that in this state a party charged with a public offense has no constitutional right to a preliminary examinaton therefor. If entitled thereto, it must be by virtue of some statute. *State* v. *Barnes,* supra, was decided under a statute (section 8, Ch. 71, Laws 1890) which declared, "No information shall be filed against any person for any crime or offense until such person shall have had a preliminary examination therefor, as pro-

vided by law, before a committing magistrate or other officer having authority to make preliminary examinations, unless such person shall waive his right to such examination;" and in that case the Court said: "The manifest purpose of this provision of the statute is, with the exceptions specified in the statute, to prohibit the state's attorney from filing an information in the District Court, charging any person with a public offense, until the person accused has first had or waived a preliminary examination before an examining magistrate upon a complaint charging the offense set out in the information filed in the District Court." That such decision was right, under the statute, we have no doubt, but since that decision the legislature has seen proper to radically change the statute. With the wisdom or policy of that change we have nothing to do. It is now provided by section 7982, Rev. Codes, that, at each term of the District Court for any county or judicial subdivision where no grand jury has been called, the state's attorney shall file informations "against all persons accused of having committed a crime or public offense within such county or judicial subdivision or triable therein: (1) When such person or persons have had a preliminary examination before a magistrate for such crime or public offense and, from the evidence taken thereat, the magistrate has ordered that said person or persons be held to answer to the offense charged or some other crime or public offense disclosed by the evidence. (2) * * * (3) When a person accused of a crime or public offense is arrested and waives, in writing, or if before a magistrate, orally, a preliminary examination therefor." Section 7983 reads as follows: "The state's attorney of the county or judicial subdivision in which any person charged with the commission of a crime or public offense has been held to answer, or other person appointed by the court as provided by law to prosecute, must make full examination and inquiry into the facts and circumstances touching any crime or public offense committed by the accused and triable in said county or judicial subdivision, and must file an information setting forth the crime committed according to the facts ascertained on such examination and inquiry and from the written testimony taken before the magistrate, whether it is the offense charged in the complaint upon which the examination was had or some other offense." It is clear from these provisions that in filing an information the state's attorney is not limited strictly to the offense named in the complaint. How far he may depart therefrom we are not now called upon to decide. To this extent we are clear: The state's attorney may file an information for any offense covered by the allegations in the complaint, or growing out of the transaction therein set forth or necessarily connected therewith, and of which the accused must know himself to be guilty if guilty of the matter charged in the complaint. In the case at bar the added allegation covered no further criminal act or criminal purpose on the part of the accused. It simply alleged the existence of a precedent fact, the existence of which, if it existed, the accused necessarily knew, and, as he was

bound to know the law, he knew the consequences of the existence of such precedent fact. It was a fact moreover, which, if proved at all, must be proved by a record that imports absolute verity, and that cannot be contradicted or explained away. There was therefore no possibility that the accused could be surprised or prejudiced by reason of the added allegation, and under our statute it was clearly proper. As opposed to this holding, we are cited to *People* v. *Christian,* 101 Cal. 471, 35 Pac. Rep. 1043, and the California cases there cited. But section 8, Art. 1, of the California constitution gives the accused a constitutional right to a preliminary examination, and the court holds that the information must be based upon the complaint, or at least upon the evidence taken at the preliminary hearing. *State* v. *Jarrett,* 46 Kan. 754, 27 Pac. Rep. 146, is also cited. But that case was decided under a statute identical with the statute under which *State* v. *Barnes* was decided. And *Kinley* v. *State* (Tex. App.) 16 S. W. Rep. 339, is also based entirely upon a statute radically different from ours.

It is urged as a jurisdictional defect in this case that, while the complaint before the committing magistrate was verified by the state's attorney on information and belief, yet the state's attorney failed to file with such complaint the depositions taken by him pursuant to section 7601, Rev. Codes, and which the law requires should be filed in order to authorize a complaint upon information and belief. The record shows that the deposition was taken as the law requires, and when the complaint was handed to the magistrate by the state's attorney the deposition was attached thereto. The magistrate marked the complaint as filed, but placed no filing mark on the deposition. The state's attorney had performed his full duty. The magistrate acquired jurisdiction. No filing mark was necessary. 7 Am. & Eng. Enc. L. (1st Ed.) 960; *Harris* v. *Watkins,* 5 Dak. 374, 40 N. W. Rep. 536.

A further jurisdictional objection is urged, in that the committing magistrate failed to indorse his order of commitment on the complaint as required by section 7966, Rev. Codes. The proper order was, however, entered in the docket which the law requires the committing magistrate to keep, and a copy of such docket entry was returned to the District Court, as required by section 7978, Rev. Codes. This was sufficient. It is the entry of the order that gives jurisdiction. *People* v. *Wallace,* 94 Cal. 497, 29 Pac. Rep. 950; *People* v. *Tarbox,* 115 Cal. 57, 46 Pac. Rep. 896. Our statutes on this point are practically identical with those of California. Nor is there anything in the point that the magistrate made no proper commitment of accused as required by section 7970, Rev. Codes. That relates merely to the protection of the officer who holds the accused. It does not affect jurisdiction.

Several assignments of error relate to the admission and rejection of testimony. They require no extended discussion. One Vavrowski was permitted to testify, over defendant's objections, concerning a certain conversation that he had with defendant relative

to a witness named Martin, and also as to a conversation that he heard between the defendant and said witness. This testimony showed that the witness Martin was what defendant called a "spotter,"—which, as we undersand it, means that he was employed to detect violations of the prohibition law,—and that he was the party that had given information against defendant, and was also a witness in the case, and that defendant was threatening Martin with violence. These threats were evidently made for the purpose of intimidating Martin, and their admission in evidence was proper. Any attempt to destroy or withhold evidence raises a presumption that such evidence is detrimental to the party seeking to destroy or withhold it. 11 Am. & Eng. Enc. L. (2d Ed.) 504, and cases cited in note. Consequently it is confirmatory of such evidence. *Kirkaldie* v. *Paige,* 17 Vt. 256.

The defendant was a witness in his own behalf. On cross-examination he was required, against his objections, to state whether or not since his release from imprisonment under a former conviction, and before his arrest in this case, he had not been arrested, charged with a similar offense, and whether or not he had not resisted the officer who made the arrest. This is urged as error. The right of the state to cross-examine a defendant in a criminal case, who voluntarily goes upon the witness stand in his own behalf, as to collateral crimes, in order to affect his credibility, even when such examination tends to degrade the witness, was, upon a full examination of the authorities, established in this jurisdiction in the early case of *Territory* v. *O'Hare,* 1 N. D. 30-44, 44 N. W. Rep. 1003. We again examined the question and reannounced the same rule in *State* v. *Kent,* 5 N. D. 516-551, 67 N. W. Rep. 1052. The cross-examination pursued in this case was fully warranted under these decisions.

All of the instructions asked by defendant were refused. There was no error in the refusal. The second instruction asked was not warranted by any evidence in the case. The others, so far as they correctly state the law, were fully and fairly covered by the instructions given. The Court, on its own motion, instructed the jury as follows: "If the wife, in the house kept and used by her and her husband as a domicile, kept and used the tenement between the dates named in the information as a place where persons were permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or if she kept intoxicating liquors at the tenement, between the dates mentioned, for sale, barter, or delivery as a beverage, contrary to law, or if, between the dates mentioned, she permitted persons to resort to the tenement for the purpose of drinking intoxicating liquors as a beverage, in violation of the laws of this state, then I charge you that the husband would be responsible for such use of the tenement, if it was with his knowledge and consent. If the wife keeps it of her own free will, without the husband's consent, and against his will, then the husband would not be guilty." And again: "Although the wife may own or rent the property in

which they live, it is incumbent upon the husband to exercise his marital powers to prevent her from keeping and maintaining in the tenement any common nuisance contrary to the laws of our state. If he fails to do so, but permits a common nuisance to be kept and maintained in the tenement by his wife, and enjoys the fruits of the illegal traffic, then he must share with her the responsibility therefor." Counsel urge very strongly that these instructions do not correctly state the law. The evidence in this case shows that the wife owned the property where the nuisance was maintained, and that the property was occupied by the defendant and his wife and five children as their home. There is testimony tending to show that the wife conducted the unlawful business. It is certain, however, that defendant had full knowledge that it was being conducted. The defendant testified that he objected to it, and told his wife that it must stop. There is other evidence from which a jury might conclude that defendant assented to and participated in the business. The charge was keeping and maintaining a common nuisance. A nuisance, in this connection, is defined by section 7605, Rev. Codes, to be a place where intoxicating liquors are sold, bartered, or given away in violation of law, or where persons are permitted to resort for the purpose of drinking intoxicating liquors as a beverage, or where intoxicating liquors are kept for sale, barter, or delivery in violation of law. It is not the selling that constitutes the nuisance, nor the keeping for sale, nor the resorting for the purposes of drinking, but it is the keeping the place where any or all of these things are done. In this instance, then, who was the keeper of this place? Webster defines a keeper as "one who has the care, custody, or superintendence of anything." When the husband lives in the house and exercises acts of control and management, he is the keeper, notwithstanding the wife may own the building and carry on the business therein, and receive all the profits. *Com.* v. *Wood*, 97 Mass. 225. The case of *Com.* v. *Carroll*, 124 Mass. 30, is directly in point. There the Court approved the following instruction: "Even if the wife carried on the traffic, and the husband had no interest in the stock in trade or in the profits, that fact alone would not exempt the defendant from the charge in the indictment. The statutes which give a married woman the right to carry on business on her separate account do not deprive a husband of his common-law right to control his own household. He has the power to prevent his wife from using his house for an illegal purpose, and, if he permits her so to use it, he becomes a participator in the misdemeanor. Where husband and wife are living together in the ordinary manner, this would be, prima facie, the liability which he was under, although this was liable to be rebutted in any particular case, if the circumstances of the case were such that the jury believed that the husband did not in fact permit and suffer the use aforesaid; and in this case the fact that the wife owned the house did not abridge the husband's right to control its use while occupied as their home." See, also, *Hunter* v. *State* (Ind. App.) 43 N. E. Rep. 452. Section 2764,

Rev. Codes, reads: "The husband is the head of the family. He may choose any reasonable place or mode of living and the wife must conform thereto." No rights that our statute give to married women to contract or transact business in their individual names, or to own property, in any manner affect the position of the husband as head of the family. All the rights, duties, and responsibilities of the position devolve upon him. He controls the family and the home. Nothing can be brought into or kept in the home residence against his will, nor can any persons resort there if he oppose. Having this right and this power, he keeps and maintains the home; and if he knowingly suffer articles upon which rests the ban of the law to be kept and sold in his home, and if he knowingly suffer persons to resort there for the purpose of drinking intoxicating beverages, contrary to law, then he, in law, assents that such things should be done in his home, and he is the person who keeps the place where the forbidden acts are done and the prohibited articles kept. He is at least a participator with his wife in the crime, and it is entirely immaterial in whose name the title to the property may stand. We find no error in the record, and the judgment of the District Court is affirmed. All concur.

(80 N. W. Rep. 477.)

STATE OF NORTH DAKOTA *vs.* JOHN A. EKANGER.

Opinion filed October 21, 1899.

Qualification of Juror—Opinion Based Upon Conversation with Person Cognizant of Facts.

Under chapter 39, Laws 1897, the fact that a party called as a juror states on his voir dire that he has an impression concerning the guilt or innocence of the accused, gathered from a general conversation with a person claiming to have some knowledge of the facts, and which it will require evidence to remove, does not disqualify the party as a juror, if it satisfactorily appears to the Court that, notwithstanding such impression, the juror can and will, if accepted, fairly and impartially try the case on the testimony adduced and the charge of the Court.

Ruling Upon Challenge When Not Reversed.

The decision of the trial court in such a case is entitled to great respect, and will be disturbed only in clear case of abuse.

Cross Examination of Defendant—Privilege Personal.

The defendant, having gone upon the stand in his own behalf, might, on cross-examination, as affecting his credibility, be asked concerning collateral offenses; and, if he claimed immunity on the ground that his answers would tend to criminate him, he himself must make the claim under the sanctity of his oath.

Husband and Wife—Liquor Nuisance—Instruction.

Where the defendant was charged with keeping and maintaining a common nuisance, and the evidence tended to establish that the

nuisance was kept in a building in which defendant and his wife resided as their home, and that the lease was in the name of the wife, and that she paid the rent, and kept and sold intoxicating liquors therein with the knowledge and consent of the defendant, it was proper to instruct the jury that, if they found such facts to exist, they should find the defendant guilty.

Appeal from District Court, Walsh County; *Sauter*, J.

John Anderson Ekanger was convicted of keeping and maintaining a common nuisance, and appeals.

Affirmed.

De Puy & De Puy, for appellant.

An opinion formed by conversation with witnesses or by reading reports of testimony or evidence disqualifies. *Brown* v. *State*, 70 Ind. 576; *State* v. *Culler*, 82 Mo. 623; *Dugle* v. *State*, 100 Ind. 259; 12 Am. & Eng. Enc. L. 355. An opinion even though based on newspaper reports or rumors if so fixed as to require evidence to remove it, disqualifies though the juror may state that he can render a fair and impartial verdict on the evidence. *Olive* v. *State*, 7 N. W. Rep. 444; *Marion* v. *State*, 29 N. W. Rep. 911; *Cowan* v. *State*, 35 N. W. Rep. 405; *Miller* v. *State*, 45 N. W. Rep. 451; *Owens* v. *State*, 49 N. W. Rep. 226; *State* v. *Wilcox*, 39 Pac. Rep. 368; *State* v. *Lattin*, 52 Pac. Rep. 314; *State* v. *Murphy*, 37 Pac. Rep. 420; *Peo.* v. *Shufelt*, 28 N. W. Rep. 79; *Peo.* v. *Barker*, 27 N. W. Rep. 539; *Stephens* v. *Peo.*, 38 Mich. 739. The discretion of the trial court in denying a challenge is subject to review. *State* v *Rutten*, 43 Pac. Rep. 30.

Jeff M. Meyers, state's attorney, for respondent.

The juror challenged was not disqualified for actual bias. Ch. 31, Laws 1897; *Aaron Burr's Case*, 1 Burr's Trial, 416; 12 Am. & Eng. Enc. L. 354 and cases cited.

BARTHOLOMEW, C. J. This was a prosecution for a violation of the prohibition law, the particular offense charged being that of keeping and maintaining a common nuisance. From a judgment of imprisonment and fine the defendant appeals.

The first assignment of error relates to the ruling of the trial court in denying a challenge for actual bias made by the defendant to a juror who was called as a talesman after defendant had exhausted his peremptory challenges. The juror, on his voir dire, stated, in substance, that he had conversed about the case with a party who "used to go to the house," and that such conversation left upon his mind an impression as to the guilt or innocence of the defendant, which impression he still entertained, and it would require evidence to remove it. He also said that this was a general conversation,—a "kind of a street rumor,"—and that, notwithstanding the impression that he entertained, if accepted as a juror in the case, he could and would "try this case solely upon the evidence produced in court, under the charge of the court, fairly and im-

partially." The argument is that a juror who entertains an impression of the defendant's guilt, which it would require evidence to remove, is not an impartial juror, and every accused person has the constitutional right to be tried, and due process of law requires that he should be tried, by an impartial jury. Courts are very familiar with this argument. Formerly it was quite generally successful. The result was that as newspapers became more numerous, and reading more general, and the discussion of current topics more universal, courts found themselves forced to try important criminal cases before jurors too ignorant to read current news, and too ignorant to converse on current topics. To correct this evil, statutes more or less radical in their terms have been enacted in many of the states; their general purpose being to declare that the fact that a person called as a juror may have formed an opinion or received an impression concerning the case from conversations or newspaper reports shall not of itself disqualify the juror, even where it would require evidence to remove the impression or opinion. 12 Am. & Eng. Enc. L. (1st Ed.) p. 354, note. Nor do these enactments contravene the sixth amendment to the federal constitution, which guarantees trial by an impartial jury. *Hopt* v. *People,* 120 U. S. 430, 7 Sup. Ct. Rep. 614; *Ex parte Spies,* 123 U. S. 131, 8 Sup. Ct. Rep. 21. The decision under these statutes are not uniform, as reference to the cases cited in the note supra will disclose. That is because the statutes are not uniform. Some are much more restricted than others. The constant tendency is to broaden the qualifications of jurors. Our own statute is among the latest. It is found in chapter 39, Laws 1897, and reads: "But no person shall be disqualified as a juror by reason of the fact that he may have heard from others or read in newspapers or public journals, any statement or statements with regard to the case to be submitted to the jury, if it shall appear to the satisfaction of the court that the impression remaining upon the mind of such person from the statements so communicated to him, will not prevent him from trying the case fairly and impartially." This statute has not heretofore been passed upon by this Court. It will be noticed that the qualification does not depend upon the fact that the person may believe or state that he can try the case on the evidence fairly and impartially. Such a test will not be accepted. See cases cited in note, 12 Am. & Eng. Enc. L. (1st Ed.) p. 355. Our statute says "if it shall appear to the satisfaction of the court," etc. Clearly the statute places the decision of the matter where it should be placed. The shades and degrees of intelligence and candor are as numerous as the individuals, and the trial judge before whom the party appears, and who may himself examine the juror and note all his mental characteristics, is the person best qualified to determine whether or not the juror can fairly and impartially try the case on the evidence notwithstanding any impression he may have. We

do not hold that his determination of the matter is conclusive, but his decision "will be treated with great respect by this Court, and only reversed when, in its opinion, such decision is clearly wrong." *State* v. *Church,* 6 S. D. 89, 60 N. W. Rep. 143. It will be noticed also, that the impression need not be received from or upon "common rumor, statements in public journals, or common notoriety," as is the case in many statutes of this character. It may arise from what he has heard from others (no exceptions), or read in the newspapers or public journals. The fact that the juror in this case talked with one who knew the facts, although not a witness, as far as the record discloses, would under many statutes disqualify him, but not under our statute. We are clear that this assignment should be overruled. Among the many cases sustaining this ruling, we cite *Hardin* v. *State* (Ark.) 48 S. W. Rep. 904; *State* v. *Hunt,* 141 Mo. 626, 43 S. W. Rep. 389; *State* v. *Reed,* 141 Mo. 546, 42 S. W. Rep. 1149; *State* v. *Dent* (La.) 7 South. 694; *State* v. *Baker,* 33 W. Va. 319, 10 S. E. Rep. 639; *Hall* v. *Com.,* 89 Va. 171, 15 S. E. Rep. 517; *People* v. *McGonegal* (Sup.) 17 N. Y. Supp. 147.

The defendant went upon the witness stand in his own behalf, and on cross-examination was asked if he was not a professional gambler. The question was asked for the purpose of affecting the credibility of the witness. Over his objections as to incompetency, etc., he was required to answer. In that there was no error. See *State* v. *Rozum,* 8 N. D. 548, 80 N. W. Rep. 477, and authorities there cited. An attempt was also made by the attorney for the defendant to claim immunity from answering on the ground that the answer would tend to convict defendant of another offense, but the case was not brought within the rule announced in *State* v. *Kent,* 5 N. D. 516, 67 N. W. Rep. 1052, where we held that the claim must be made by the witness, and under the sanctity of his oath. What is here said applies also to the error alleged in requiring defendant's wife to answer certain questions against the objections of counsel that the answers would tend to incriminate her.

The recalling of the defendant by the state for further cross-examination after defendant had rested was a matter resting in the judicial discretion of the trial court. We find no abuse of such discretion. The matter elicited was proper cross-examination, and it was entirely proper to permit the state to rebut the statements of the defendant made on such cross-examination.

In this case the building where it is claimed the nuisance was kept and maintained was the domicile of the defendant and his wife, but the lease of the premises was in the name of the wife. It is claimed that she paid the rent, and that she conducted the unlawful business in said building. On this point the Court gave substantially the same instructions that were given by the trial court, and approved by this Court, in *State* v. *Rozum,* supra. Under our holding, there was no error in giving the instructions. Affirmed. All concur.

(80 N. W. Rep. 482.)

STATE OF NORTH DAKOTA *vs.* CHRIS KELLAR.

Opinion filed October 25, 1899.

Incest—Testimony of Accomplice—Corroboration.

In this state no conviction for any crime can be had upon the uncorroborated testimony of an accomplice. There must be other testimony tending to connect the defendant with the commission of the offense.

Female Participant an Accomplice.

The female participant in incestuous intercourse, whose action is voluntary, and uninfluenced by any element of coercion, either by force, fraud, fear, or undue influence, is an accomplice in the crime of incest.

Question for the Jury.

Whether or not the female participant in incestuous intercourse is an accomplice in the crime of incest is generally a question of fact for the jury, and this is always the case where her coercion is sought to be shown inferentially.

Appeal from District Court, Morton County; *Winchester,* J.
Chris Kellar was convicted of incest, and appeals.
Reversed.

H. G. Voss, for appellant.

James G. Campbell, state's attorney, for respondent.

BARTHOLOMEW, C. J. There is but one question in this case that need be considered. The defendant has been convicted of the crime of incest, the female being his daughter. It is not claimed by the state, and could not be upon the record, that there is any evidence tending to connect the defendant with the commission of the crime except the evidence of the daughter. Our statute (section 8195, Rev. Codes) reads: "A conviction cannot be had upon the testimony of an accomplice unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the offense, and the corroboration is not sufficient if it merely shows the commission of the offense, or the circumstances thereof." The defendant asked the following instruction: "Under the laws of this state no conviction can be had in a criminal case upon the uncorroborated testimony of an accomplice. It is for you to determine from the testimony in this case whether or not the witness Lizzie Kellar was an accomplice in the commission of this crime. If you find as a fact that sexual intercourse was had between the defendant and the said Lizzie Kellar, and you find that she voluntarily submitted to such intercourse, without being forced, then she, in law, is an accomplice to the commission of said offense, and no conviction in this case can be had unless her testimony is corroborated by some other credible testimony in this case; and the corroboration is not sufficient if it merely shows the commission of the

offense, or the circumstances thereof, but such corroborative testimony must tend to connect the defendant with the commission of the crime." This instruction was refused, nor did the Court, in its charge to the jury, in any manner refer to this subject. This was error, which compels us to reverse this judgment. Whart. Cr. Ev. § 440, defines an accomplice as "a person who knowingly, voluntarily, and with a common intent with the principal offender unites in the commission of a crime." While this definition has been often quoted, and is strictly accurate in the great majority of cases, it is not, we think, universally accurate. Two persons may be equally guilty in the commission of a crime, may both be present, and equally participate in its commission. As between them, there can be no "principal offender," yet each is the accomplice of the other. We prefer Black's definition: "An associate in crime; one who co-operates, aids, or assists in committing it." That the female participant in incestuous intercourse, whose action in the matter is voluntary, and uninfluenced by any element of coercion, either by force, fear, fraud, or undue influence, is an accomplice in the commission of the crime of incest, is, we think, firmly settled in the law. *State* v. *Jarvis,* 18 Ore. 360, 23 Pac. Rep. 251; *Dodson* v. *State,* 24 Tex. App. 518, 6 S. W. Rep. 548; *Freeman* v. *State,* 11 Tex. App. 92; *State* v. *Dana,* 59 Vt. 614, 10 Atl. Rep. 727; *Porath* v. *State,* 90 Wis. 527, 63 N. W. Rep. 1061; *Clark* v *State,* (Tex. Cr. App.) 45 S. W. Rep. 576; *State* v. *Chambers,* 87 Iowa 1, 53 N. W. Rep. 1090; *De Groat* v. *People,* 39 Mich. 124; Whart. Cr. Ev. § 440; 10 Am. & Eng. Enc. L. 347, note 1. Where force, fraud, or fear is used to overcome the will of the female, she is not an accomplice, as the above authorities abundantly show. We have read the evidence in this case with care. Certain it is that there is nothing in the evidence from which a court could say, as matter of law, that the female was coerced. If fear of her father, or his undue influence over her, overcame her will, she was not an accomplice. But this was a question for the jury. In *Porath* v. *State,* supra, the Court said: "It does not necessarily follow in such cases that the female is to be regarded as an accomplice, and particularly in a case like the present, in view of the relation between the parties, and the coercive authority of her father over her. *Raiford* v. *State,* 68 Ga. 672; *Norton* v. *State,* 106 Ind. 163, 6 N. E. Rep. 126. If, in the commission of the incestuous act, the female was the victim of force, fraud, or undue influence, so that she did not act voluntarily, and join in the commission of the act with the same intent that the accused did, then she ought not to be regarded as an accomplice. In all such cases, where it is to be proved inferentially, the question of accompliceship is one of fact for the jury. Whart. Cr. Ev. § 440; *Mercer* v. *State,* 17 Tex. App. 452." See, also, *State* v. *Haynes,* 7 N. D. 352, 75 N. W. Rep. 267. The wording of the instruction asked may, perhaps, be open to criticism. The words "without being forced," as therein used, are somewhat bald, and might imply that physical force was necessary. Strictly,

however, the instruction asked was correct, and should have been given; but a modification as indicated would have improved it. The refusal of the Court to give this instruction, and its failure to instruct upon the question in any form, constitute error, which necessitates reversal and a trial de novo. Reversed. All concur.
(80 N. W. Rep. 476.)

A. L. PLUMMER *et al vs.* E. A. BORSHEIM.

Opinion filed October 10, 1899.

Constitutional Law—General Law—Uniform Operation.

The proviso found in section 1, Ch. 143, Laws 1899, violates section 11 of the state constitution, which requires all general laws to have a uniform operation, in that it applies only to school townships which include a city of 800 inhabitants or more.

Incorporated Villages Not Cities.

The word "city," as there used, *held* not to include incorporated towns or villages.

Appeal from District Court, Traill County; *Pollock*, J.

Action by A. L. Plummer and E. Y. Sarles against E. A. Borsheim, county superintendent of schools of Traill county. Demurrer to the complaint was sustained, and plaintiffs appeal.

Reversed.

Carmody & Leslie, (*Cochrane & Corliss* of counsel) for appellants.

House Bill Number 26, entitled "An act to amend section 660 of the Revised Codes North Dakota 1895, relating to what territory may be organized into district school corporations," is unconstitutional. It conflicts with section 11, subds. 4 & 12 of section 69, and with section 70, Constitution. This law applies only to the city and school township of Hillsboro. It makes no difference that it is general in form, being special in operation. *Nichols* v. *Walter*, 33 N. W. Rep. 800; *Vermont L. & T. Co.* v. *Whithed*, 2 N. D. 82; *Anderson* v. *City*, 42 N. J. L. 486; *McCarthy* v. *Com.*, 2 Atl. Rep. 423, 5 Atl. Rep. 215; *Morrison* v. *Bachert*, 5 Atl. Rep. 739; *Closson* v. *Board*, 5 Atl. Rep. 323; *Edmonds* v. *Herbrandson*, 2 N. D. 270; *Clark* v. *Davis*, 106 Pa. St. 377. The act conflicts with section 61 of the state constitution in that it embraces more than one subject, and the subjects are not expressed in the title. *State* v. *Nomland*, 3 N. D. 427; *Divet* v. *Richland County*, 8 N. D. 65. Judicial notice must be taken of the contents of the legislative journals. § 11, Ch. 65, Laws 1897. Each bill shall have three readings. § 63, Const. An entry of the signing of a bill must be made in the journal. § 66, Const. An inspection of the senate and house journals will disclose that they contain no entry that the presiding officer of either house signed the bill in the presence of the house

over which he presided. This is fatal. *Hunt* v. *State*, 3 S. W. Rep. 233; Cooley's Const. Lim. 164; *Perry* v. *Ry. Co.*, 58 Ala. 540; *State* v. *Buckley*, 54 Ala. 599; *Spangler* v. *Jacoby*, 14 Ill. 297; *State* v. *Smith*, 7 N. E. Rep. 447; *South Ottowa* v. *Perkins*, 94 U. S. 260; *Bank* v. *Ottowa*, 105 U. S. 667; *Koehler* v. *Hill*, 14 N. W. Rep. 738; *Fordyer* v. *Godman*, 20 Ohio St. 1; *Bank* v. *Comm's'rs*, 25 S. E. Rep. 966; *Cohn* v. *Kingsley*, 49 Pac. Rep. 985.

Ball, Watson & Maclay, for respondent.

Population may be made the basis of classification, provided such classification is not made a means of avoiding the constitutional interdict or is not plainly illusory. In such acts the legislation is constitutional if its subject matter be one having a natural relationship to population. *State* v. *Hoagland*, 16 Atl. Rep. 166; *State* v. *Mortland*, 20 Atl. Rep. 673; *State* v. *Court*, 15 Atl. Rep. 272; *Peo.* v. *Onahan*, 48 N. E. Rep. 1003; *Johnson* v. *Harrison*, 50 N. W. Rep. 923; *Tulare* v. *May*, 50 Pac. Rep. 427; *In re Norton*, 64 N. W. Rep. 190; *In re Church*, 92 N. Y. 1; *Darrow* v. *Peo.* 8 Pac. Rep. 661; *Marmet* v. *State*, 12 N. E. Rep. 463; *State* v. *Donovan*, 15 Pac. Rep. 783; *State* v. *Long*, 52 Pac. Rep. 645; *Bowe* v. *St. Paul*, 73 N. W. Rep. 184. The intention of this legislation was to relieve the farming districts from the burden of contributing to the support of schools in cities using that term in its popular sense. In that sense the word "city" includes towns and villages. *Peo.* v. *Stephens*, 62 Cal. 209-236; *Burke* v. *Monroe Co.* 77 Ill. 610; *State* v. *Board*, 29 Pac. Rep. 974; *Elma* v. *Carney*, 30 Pac. Rep. 732; *Peo.* v. *McCune*, 46 Pac. Rep. 658; *Van Riper* v. *Parsons*, 40 N. J. L. 4; *Herrman* v. *Town*, 43 Atl. Rep. 703. The statute does not embrace more than one subject, which is sufficiently expressed in the title. *State* v. *New Whatcom*, 27 Pac. Rep. 1020; *State* v. *Brown*, 4 N. W. Rep. 379; *McGurn* v. *Board*, 24 N. E. Rep. 529; *Morford* v. *Unger*, 8 Iowa, 82; *State* v. *Board*, 69 N. W. Rep. 1083; *Johnson* v. *Harrison*, 50 N. W. Rep. 923; *In re Board*, 32 Pac. Rep. 850; *State* v. *Hocker*, 18 South. Rep. 767. *Comm's'rs* v. *Bailey*, 13 Kan. 600-609; *State* v. *Commissioners*, 21 Pac. Rep. 601; *Peo.* v. *Barkelow*, 37 Mich. 455; *Fielder* v. *State*, 49 S. W. Rep. 376; *Hargrave* v. *Weber*, 32 N. W. Rep. 921; *Roby* v. *Sheppard*, 26 S. E. Rep. 278; *Sweet* v. *Syracuse*, 27 N. E. Rep. 1081; *State* v. *Cassidy*, 22 Minn. 312; *Supervisors* v. *Heenan*, 2 Minn. 281; *Attorney Gen'l* v. *Weimar*, 26 N. W. Rep. 773; *State* v. *Gallagher*, 44 N. W. Rep. 529; *Hoskins* v. *Crabtree*, 44 S. W. Rep. 434; 23 Am. & Eng: Enc. L. 257, n. 3.

BARTHOLOMEW, C. J. Plaintiffs and appellants can succeed in this case only upon the theory that chapter 143, Sess. Laws 1899, was never legally enacted, or that the same is, in whole or in part, unconstitutional. The view we take of the case renders it unnecessary for us to discuss the matter of the legality of the enactment, and our discussion of its constitutionality will be restricted to a portion thereof. The act attempts to amend section 660 of the Re-

vised Codes. Said section is a part of chapter 9 of the Political Code, being the general law relating to education. The only amendment of any importance introduced into said section by the enactment in question is contained in a proviso which declares, in effect, that in any school township containing a city of 800 inhabitants or more, and which is not organized as an independent school district, the residents in said school township outside the city limits may separate themselves from the city and organize a distinct school township by presenting to the county superintendent of schools a petition, signed by at least two-thirds of the legal voters residing in said school township outside the city limits, asking for the organzation of such separate school township. Thereupon it becomes the duty of such superintendent to call an election in said proposed school township for the election of school-township officers. At the time the act went into effect the City of Hillsboro, in Traill county, contained more than 800 inhabitants, was not organized as an independent school district, but was situated within a school township. Subsequently the residents in the township outside the city limits undertook to organize a separate school township. A petition was presented to the county superintendent, and he was about to call an election, when this action was brought, setting forth the facts, and claiming that the act was unconstitutional, and praying that the defendant, the county superintendent, be perpetually enjoined from calling such election. A demurrer to the complaint was sustained, and from the order sustaining the demurrer plaintiffs appeal.

It is urged in this Court that the proviso in question is not uniform in its operation, as required by section 11 of our state constitution, and that it constitutes special legislation, within the inhibition contained in section 69 of that instrument. The argument against uniformity in operation is based upon the fact that, under the law as it existed in Dakota Territory and in the State of North Dakota until the adoption of the Revised Codes, municipalities were organized as cities or as incorporated towns or incorporated villages. They are still organized as cities or incorporated villages. Each of these incorporated towns or villages contains, or may contain, 800 inhabitants or more, and may fulfill every other condition specified in the proviso. The inhabitants of such incorporated towns and villages are entitled to the same school privileges and facilities as the equal number of inhabitants residing in a city similarly situated. The relations, for all school purposes, of those living within the limits of the school township, but outside the limits of the incorporated town or villages, in the one case, and outside the limits of the city, in the other, are in all respects identical. Hence the operation of the law is not uniform upon persons and communities similarly situated. Against this it is urged that the legislature used the word "city" in a comprehensive sense, intending to include all incorporated municipalities. The industry of counsel has enabled them to tabulate a number of instances where the legislature has

used the word in a connection which counsel contend indicates a legislative construction in conformity with the views of counsel. An examination of these statutes has not carried us to the same conclusion. Many of them relate to the disposition of sewerage, and the various matters incident to the construction of sewers and pavements. These matters are naturally and universally associated with cities. The construction of sewers and pavements is now, and perhaps ever will be, an unheard-of thing in the incorporated towns and villages of this state. It is probable that in a few instances the legislature used the word inadvertently or improperly, but in many of the statutes cited the legislature expressly recognizes towns and villages, and in the very statute into which it is sought to incorporate this proviso (chapter 9, Pol. Code) provision is made for placing towns and villages in one school corporation when they are intersected by township or county lines. Section 663, Rev. Codes. The three classes of municipalities are distinct, under the law. We are not warranted, even for the purpose of upholding a legislative enactment, in giving to language not technical in its nature a meaning entirely different from that ordinarily and popularly given to it, and particularly is this true when there is no suggestion from the context that the language is used in any other than its ordinary acceptation. It is true that where in the same enactment the words "cities and towns" or "cities and villages" have been used, and subsequently the word "city" only was used in referring to the same matter, the latter has been held comprehensive enough to include towns or villages. *Burke v. Monroe Co.*, 77 Ill. 610; *Stimson Mill Co.* v. *Board of Harbor Line Com'rs* (Wash.) 29 Pac. Rep. 938; *People* v. *Stephens*, 62 Cal. 209. But we have no such conditions presented here. The opposite conditions prevail.

It is contended, however, that a legislative classification by cities is a proper classification, and that a statute that operates uniformly upon all in a given class is not vulnerable to the constitutional objections urged. The conclusion is correct, but we cannot admit the premises in this instance. That cities may be placed in a class that does not include other forms of municipal government is readily granted. And cities may again be classified for certain purposes according to population. Such statutes are common, and are very generally upheld where there is any reason for the classification. In *Edmunds* v. *Herbrandson*, 2 N. D. 270, 274, 50 N. W. Rep. 970, 971, this Court said: "But it is our opinion that every law is special which does not embrace every class of objects or persons within the reach of statutory law, with the single exception that the legislature may exclude from the provisions of a statute such classes of objects or persons as are not similarly situated with those included therein, in respect to the nature of the legislation. This classification must be natural, not artificial. It must stand upon some reason, having regard to the character of the legislation. And in *Trust Co.* v. *Whithed*, 2 N. D. 82, 49 N. W. Rep. 318, in speaking of this constitutional provision, it is said: "The uniform operation re-

quired by this provision does not mean universal operation. A general law may be constitutional, and yet operate in fact only upon a very limited number of persons or things or within a limited territory. But, so far as it is operative, its burdens and benefits must bear alike upon all persons, and things upon which it does operate, and the statute must contain no provision that would exclude or impede this uniform operation upon all citizens, or all subjects or places, within the state, provided they were brought within the relations and circumstances specified in the act. * * * But this power of the legislature is circumscribed. It is not an arbitrary power waiting the whim of the legislature. Its exercise must always be within the limits of reason, and, of a necessity, more or less pronounced. Classification must be based upon such differences in situation, constitution, or purposes, between the persons or things included in the class and those excluded therefrom, as fairly and naturally suggest the propriety of and necessity for different or exclusive legislation in the line of the statute in which the classification appears." The authorities are quite fully cited in the above cases. If the principles there announced be correct,—and the authorities overwhelmingly sustain them,—then it is clear to us that the classification in this case is illusory merely. It is born of no necessity or suggestion of necessity. As already stated, a city with a population of 800, not organized as an independent school district, but located in a school township, possesses, as to school matters, no powers or privileges that are not also possessed by an incorporated town or village in all respects similarly situated. Nor can one impose any burdens for school purposes that the other may not impose. But, more than this, we must remember that the classification sought to be made is not so much a classification of cities as of the persons living outside the city limits, but within the school township in which the city is located. It is to such persons that this proviso seeks to extend special privileges, and why they should be favored beyond those citizens who reside in a school township that includes an incorporated town or village, but outside the limits of such town or village, we cannot understand. No reason for such a classification can be conceived. Clearly the proviso in question is vulnerable to the constitutional objections urged.

The District Court for Traill county will set aside its order sustaining the demurrer to the complaint, and enter an order overruling the same, with leave to the defendant to answer if he be so advised. Reversed. All concur.

(80 N. W. Rep. 690.)

O. M. OMLIE *vs.* THE FARMERS' STATE BANK.

Opinion filed October 12, 1899.

Conversion—Evidence of Ownership.

Under the evidence (following Lane v. O'Toole, 8 N. D. 210, 78 N. W. Rep. 77), *held*, that the plaintiff was not the owner of the wheat in question, and hence could not recover for its conversion.

Verdict by Direction of Court.

Held, further, that the trial court erred in denying defendant's motion to direct a verdict in defendant's favor.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by O. M. Omlie against the Farmers' State Bank of St. Thomas. Verdict directed for plaintiff, and defendant appeals.

Reversed.

Wm. McMurchie and *Gray & McMurchie*, for appellant.

Plaintiff neither owned the property, nor was he entitled to its possession at the time suit was commenced, hence could not maintain conversion. *Parker* v. *First National Bank*, 3 N. D. 87; *Ellestad* v. *N. W. Elev. Co.*, 6 N. D. 93; *Donovan* v. *St. A. & D. Elev. Co.*, 7 N. D. 521. The contract gives plaintiff no right to possession except upon a contingency, which the evidence shows had not arisen. *Black* v. *Elev. Co.*, 7 N. D. 129. The contract in suit was construed in *Lane* v. *O'Toole*, 8 N. D. 210. Plaintiff cannot in an action of conversion recover for the proceeds of the property converted. His action is in equity. *Anderson* v. *Bank*, 5 N. D. 89. The pleading must specify the property converted. *Russell & Co.* v. *Amundson*, 4 N. D. 112.

Fraine & Douglas, for respondent.

WALLIN, J. This action was tried to a jury. At the close of the case, on motion of plaintiff's counsel, the Court below directed a verdict in favor of the plaintiff, and such verdict was returned accordingly. An exception was saved to such direction, and the same is assigned as error in this Court. It appears of record that the verdict was directed "on the ground and for the reason that all the evidence in the case shows a conversion by the defendant, the Farmers' State Bank, of property of the plaintiff, the value of which was $246." The record shows the following facts, which are undisputed: In the month of October, 1895, there was stored in a certain grain elevator situated at Crystal, N. D., and owned by the firm of O'Conner Bros. & Grandy, a quantity of No. 1 Northern wheat, to-wit: 965 bushels. Said wheat had been placed in said elevator by one Thomas O'Toole, and a storage ticket had been issued therefor, and delivered to O'Toole. At and prior to the delivery of the wheat at the elevator, and while the storage ticket was in O'Toole's possession, O'Toole was indebted to the defendant

in a considerable sum, and was then being pressed for payment of the said indebtedness. Under these conditions O'Toole sold a portion of the wheat represented by the storage ticket, receiving in payment a check of O'Connor Bros., drawn upon the First Bank of Crystal, payable to defendant's order, which check, by O'Toole's direction, was delivered to the defendant. The defendant presented the check for payment, and it was paid by the bank upon which it was drawn. The amount of the check—$246—was credited upon O'Toole's indebtedness to the defendant. The complaint states "that on or about the 15th day of October, 1895, this plaintiff demanded, and caused to be demanded, from the defendant, through its cashier, at St. Thomas, North Dakota, the repayment to him of the money received by defendant, and that defendant neglects and refuses to deliver to the plaintiff the money so converted by the defendant." The complaint further charges "that said money so paid to the defendant was the proceeds of the property belonging to the plaintiff, and which money was the property of this plaintiff, as was at that time well known to the defendant"; and, further, that "the defendant unlawfully and without authority converted and disposed of said money to its own use and benefit, and to such extent did convert to its own use and benefit the storage ticket hereinbefore mentioned." In another connection the complaint alleges that the defendant, by its agent, "did, by means of threats, coerce and overpersuade the said Thomas O'Toole to have said wheat ticket cashed," and that "the wheat and the storage ticket at that time were, to defendant's knowledge, the property of the plaintiff." It is further alleged that in placing the grain in the elevator O'Toole acted as the plaintiff's agent, but there is no testimony whatever in the record tending to show that O'Toole, in placing the grain in the elevator did so at the request of the plaintiff, or pursuant to any directions given by plaintiff so to do. At the trial, there was much contention between counsel over the legal aspects of the case. Defendant's counsel sought by divers motions and objections to obtain a ruling which would limit and define the grounds of the action, but the Court below declined to so limit the plaintiff, and at the close of the case it is difficult to ascertain from the record the exact legal theory upon which plaintiff demanded a verdict. Whether the action was based upon conversion of the wheat itself, or a conversion of the storage ticket, or of the proceeds of the check, was far from being clear upon the record. From defendant's standpoint, the Court should have directed a verdict in its favor, and counsel for defendant requested the Court so to do, upon the ground, among others, that plaintiff had failed to establish any cause of action whatever against the defendant. This motion was overruled, and the defendant excepted to the ruling, and assigns the same as error here.

Counsel for respondent, in their brief filed in this Court, claim that the defendant and others converted the wheat itself by overpersuading and coercing O'Toole into selling the storage ticket representing the wheat, and that the defendant directly participated in

such conversion, and profited by it to the amount of the money it received out of the check. In disposing of the case this Court has not found it necessary to determine any question of mere procedure. We will assume, for the purposes of the case, and for the plaintiff's benefit, that the action will lie for converting the wheat, and that plaintiff can recover in this action if he has established the facts upon which he relies as a basis for recovery. The complaint states, in effect, that the plaintiff was the owner of the wheat and of the wheat checks, and that O'Toole acted solely as plaintiff's agent in placing the wheat in the elevator, and in receiving the storage ticket therefor. In brief, the plaintiff claims to recover upon the ground that he owned the grain. To establish such ownership, O'Toole was sworn in plaintiff's behalf, and testified, in substance, that the grain in question was raised by him in the year 1895, on certain premises upon which he then resided, and that he placed the grain in the elevator, and sold a portion of the same, and out of the proceeds caused $246 to be paid to the defendant to apply on his indebtedness. The plaintiff testified in his own behalf to the effect that the land upon which O'Toole resided, and upon which the wheat was raised, was occupied by O'Toole under the provisions of a certain sale contract therefor dated November 20, 1894, in which plaintiff was party of the first part, and O'Toole party of the second part. This contract was put in evidence, and under its terms the plaintiff claims the ownership of the wheat in question. An examination of the contract in evidence reveals the fact that the same is the identical instrument which received a construction at the hands of this Court in the case of *Lane* v. *O'Toole*, 8 N. D. 210, 78 N. W. Rep. 77. The instrument is set out in full in the opinion of the Court in that case, and need not, therefore, be reproduced here. The case cited is entirely analogous in its facts and in legal principle to the case at bar, and is distinctly in point. In that case this Court was called upon to construe the contract in question, and did so, holding that O'Toole was primarily the owner and entitled to the possession of all crops raised by him under the contract, and that O'Toole could not be divested of his possession of such crops except upon a showing of certain prerequisite conditions, which were not shown to exist in that case. In the absence of any such showing, the possession of the crop then in litigation was awarded to O'Toole. In this case a precisely similar state of facts is shown. In the case at bar, as in the case cited, there is not a scintilla of evidence tending to show that the conditions upon which the right to take possession of the crops could be exercised had taken place. There is neither allegation nor proof that O'Toole had defaulted in the performance of the contract on his part at any time prior to the sale of the storage ticket; nor is there a claim made that the plaintiff had, prior to the sale of the ticket, declared a forfeiture of the contract in evidence, or in any way sought to assert any right to the possession of the crop in question. Under these circumstances it is entirely clear that under the contract, as

already interpreted by this Court, and to which interpretation we adhere, the plaintiff was neither the owner nor entitled to the possession of either the wheat in question or the storage ticket which represented the same. Our conclusion is that the Court erred in refusing to direct a verdict for the defendant. The order refusing to grant a new trial is reversed, and a new trial granted. All the judges concurring.

(80 N. W. Rep. 689.)

AUGUST BRUMMOND *et al vs.* ALBERTINE KRAUSE *et al.*

Opinion filed October 11, 1899.

Cancellation of Deed—Fraud—Undue Influence.

When a deed given by parents to their adult child is attacked for the alleged fraud of the latter in procuring it to be executed, and it appears that the parents were feeble from age as well as illiterate, and that a relation of confidence and trust existed between them by reason of their dependency on such child, the burden is upon the child to show the fairness of the transaction.

Burden of Proof to Show Fair Dealing.

It is not enough for one who has made a written contract with illiterate and infirm persons to show that the contract was read to them. It must also appear that they understood it and assented to it knowingly.

Deed Void Between the Parties—Subsequent Mortgage Also Void.

Under the facts stated in the opinion, showing that the deed executed by the plaintiffs to their daughter was for a grossly inadequate consideration, and that it was signed by them under the controlling influence of such daughter and her husband, and in ignorance of its nature and effect, and without negligence on their part, *held*, that such deed is void. *Held*, further, that the mortgage thereafter executed by the grantee and her husband is also void; it appearing that the mortgagee had full knowledge of the acts leading up to the execution of the deed and the means by wich it was obtained.

Appeal from District Court, Richland County; *Lauder*, J.

Suit by August Brummond and Louisa Brummond against Albertina Krause and others. Judgment for plaintiffs, and defendants appeal.

Affirmed.

Chas. E. Wolfe and *W. E. Purcell*, for appellants.

Freerks & Freerks, for respondents.

YOUNG, J. The plaintiffs seek in this action to annul and cancel a certain warranty deed executed by them on or about December 28, 1897, conveying 160 acres of land, situated in Richland county, to the defendant Albertina Krause; also to cancel and declare void a mortgage thereon executed by said Albertina Krause and John

Krause, her husband, in favor of Otto Latzky, the other defendant, to secure the sum of $300. The mortgage bears date December 30, 1897. Fraud on the part of the grantee and her husband in procuring the execution of the deed, and knowledge thereof and participation therein by Latzky, the mortgagee, are alleged as the basis of the relief sought. The trial court found for the plaintiffs, and a decree was ordered and entered declaring both the deed and mortgage void, and quieting title in the plaintiffs. The case is here for trial anew upon defendants' appeal, and involves only a retrial of fact issues. Our determination of the facts from the printed evidence does not differ essentially from the findings of the trial judge, and our conclusion is that the decree canceling both the deed and the mortgage, and declaring them void, was proper.

August Brummond and Louisa Brummond, the plaintiffs herein, are husband and wife. Both are Germans. Neither can write, read, or speak the English language. August Brummond is 74 years old, and his wife is 66. They came to this country about 14 years ago. In 1892, August Brummond filed a homestead entry upon the land in question. Since that time, and up to the execution of the deed, it was occupied by him and his wife as their home. Final proof was made in August, 1897, under the homestead laws of the United States, and final receiver's receipt issued. Albertina Krause, the grantee, is plaintiffs' daughter. She, with her husband, John Krause, lived upon an adjoining claim, which was not proved up when the deed in question was executed. Their houses were little more than 50 feet apart. During the several years they lived there the two families appear to have aided one another in various ways. For instance, the son-in-law assisted the plaintiff in making his filing, also his final proof, and seems to have advanced the money to pay the fees. He also helped build the little shanty in which the old folks lived, and broke up and brought under cultivation a large portion of their land. On the other hand, the services of the plaintiffs were always at the command of the defendants, and were frequently called for; Mrs. Brummond assisting her daughter in her housework and in the care of her children, and her husband laboring in the fields. They also permitted the defendant Krause to crop and use their land as his own. Generally speaking, their business dealings were conducted in a manner usual to those similarly related,—without definite agreements or settlements. The relation of the parties was not only one of trust and confidence, but, on account of the illiteracy, ignorance, and mental and physical infirmities incident to their advanced years, plaintiffs were entirely dependent upon their daughter and her husband for guidance in all their affairs. It is clear from the evidence that the conduct of the daughter towards her aged parents was always unfilial, domineering, and even brutally cruel. Threats against the life of her parents were of frequent occurrence, and at times her vicious disposition vented itself in blows upon her mother. So, too, the daughter seems to have had the steadfast desire of getting the deed to this land, from the time her

father filed upon it, notwithstanding it was all the property her father and mother had to support them for the rest of their lives, and in face of the fact that they had seven other children then living. The fact that plaintiffs continued to live in this condition of dependency, as the evidence shows they did, and to serve their daughter and her husband for so many years, is not to be attributed to choice, but to their helplessness to do otherwise. The defendant Otto Latzky held Krause's note, secured by chattel mortgage upon the horses and chattels with which he (Krause) operated his own and plaintiffs' land, and was pressing for payment. Krause had no other property upon which he could either further secure Latzky, or upon which to borrow money to pay him, and this was known to Latzky. In November, 1897, with Latzky's knowledge, Krause and his wife negotiated with an attorney in Wahpeton for a $400 loan, to be secured by a mortgage to be executed by plaintiffs upon their land, the notes to be guaranteed by the Krauses. This was for the purpose of getting money to pay Latzky. The mortgage and notes for this loan were executed by plaintiffs under the influence, as we think, of statements by the defendants that, if not done, the horses and machinery would all be taken away from the farm. For some reason the attorney of the mortgagee declined to complete the loan, and the papers were returned to the defendant Krause, who then had the same attorney prepare a warranty deed to the land in which his wife was named as grantee, ready for plaintiffs' signatures. A typewritten contract was also prepared, bearing date December 20, 1897, wherein these plaintiffs acknowledged the receipt from the Krauses of $618, as theretofore paid to them in the form of money, labor, and goods, in consideration for which, and an agreement to furnish a certain yearly support, it was recited that they had conveyed to Albertina Krause the land in question. Defendants, on their part, agreed in said contract to deliver to plaintiffs during their lifetime, and yearly, $25 in cash, 25 bushels of potatoes, 500 pounds of flour, 3 cords of wood, and 1 hog. The plaintiffs had nothing to do with the negotiations for the mortgage loan or the preparation of this deed and contract. Neither of them was in Wahpeton. The mortgage was signed and acknowledged at their house before a notary public sent there for that purpose. The entire business was conducted by the Krauses, and the data for drawing the contract was furnished to the attorney by them. Latzky, in the meantime, apparently assured that he was to get the proceeds of the $400 loan which was being negotiated upon the plaintiffs' land or security thereon, running to himself, appears to have bought certain other outstanding claims against the Krauses and added them to those already held by him. Among these was a store account of Hunger & Co., dealers in general merchandise in Hankinson. Latzky was a member of this firm. The failure to get the $400 loan led to the preparation by defendants, and subsequent execution by plaintiffs, of the deed which is here attacked. John Krause, upon his return from Wahpeton with the deed and contract which had been pre-

pared, took the plaintiffs to Hankinson, to the store of Hunger & Co., where both instruments were signed by the old people in the presence of F. O. Hunger, Latzky's partner, and his father, Ed. Hunger, who witnessed the signatures. F. O. Hunger was a notary public, and took their acknowledgment to the deed. Krause left the deed with Hunger at the store, and, after taking the old folks home, returned to the store with his wife, two days later ,and before the same notary, they gave the note to Latzky for $300, and also executed a mortgage upon this land to him, securing it. The note and mortgage were prepared by the notary public from data handed to him by his partner, the defendant Latzky. The deed and mortgage were taken charge of by Hunger, and were sent for record together, and were recorded on January 3, 1898.

Before referring to the question whether there was fraud or deception practiced upon the plaintiffs by the Krauses to secure the execution of the deed, and of such a nature as to avoid it, we will say that the evidence gives no support to the contention that Latzky is an innocent purchaser, and, as such, is entitled to have his mortgage upheld, regardless of the result of our finding as to the deed. He had a personal interest in the execution of the deed, and his personal knowledge, we think, extended to all important acts done, up to and including its execution. The trial court found that Hunger, who acted as conveyancer and notary, was present, and acted at the request of, and "as agent for, Latzky in reference to such conveyance." This finding has abundant support in the evidence. It is also evident to us that Latzky had personal knowledge of all that was being done. Under this state of facts, his mortgage must stand or fall with the deed.

Enough has been said to show that a relation of trust and confidence existed between the grantors and the grantee,—the relation of parent and child; not in this case the child yielding to the superior will of the parent, but of aged and ignorant parents, almost wholly dependent upon the child for guidance in their affairs. Indeed, the evidence shows that the only business ever transacted by this aged couple was the filing and proof on this land and the signing of the mortgage, and that these acts were under the direction of their daughter and her husband. *Highberger* v. *Stiffler*, 21 Md. 338, is somewhat similar in its facts. The Court said: "The natural relation of the parties was reversed in this instance by the influence of time. The parent had become a child, and the child was guardian to the parent. The same dependence, overweening confidence, and implicit acquiescence which rendered one an automaton in the hands of the other existed, —'*Et ubi eadem ratio, ibi idem jus.*' The wish of the agent had become the will of the principal. Whatever the former suggested, the latter executed. There was no consent of two minds, but a merger of the principal's mind in the mind of the agent." It is a well-settled principle that contracts between persons occupying such relations will be carefully watched by courts of equity, and will be set aside where the stronger mind has induced

it to be made, unless the bona fides of the transaction is shown. Kerr, Fraud. & M. 150-152; *Leighton* v. *Orr*, 44 Iowa, 679; *Tucke* v. *Buchholz*, 43 Iowa, 415; *Gardner* v. *Lightfoot*, 71 Iowa, 577, 32 N. W. Rep. 510; *Thorn* v. *Thorn*, 51 Mich. 167, 16 N. W. Rep. 324.

Can this deed be upheld, under the evidence and the foregoing principle? We think not. What was the consideration for the deed? The contract which the Krauses had drawn in Wahpeton recites it to be $618 formerly had by the grantors, and an agreement for their support during their lives. This item of $618 had existence merely on paper. The plaintiffs owed no such sum. Neither had that or any other sum been agreed upon or talked about as due the Krauses. No demand was ever made upon plaintiffs for payment, or intimation given them that the Krauses claimed they owed them. The agreement for support, then, is the only consideration for the deed, and that, in our view is unconscionably inadequate. The land was found by the trial court to be worth $1,200. On it plaintiffs had their home. For this they received only the unsecured promise of the daughter and son for $25 cash, 25 bushels of potatoes, 500 pounds of flour, 3 cords of wood, and 1 hog each year, with the proviso that the foregoing is to be cut in two in case one of them should die. This annual allowance is not even adequate compensation for the use of the land, saying nothing of it as consideration for a transfer of the title. So, too, the allowance of the small sum of $25 in cash to provide the various necessities of this aged couple, and the provision of but 3 cords of wood for summer and winter fuel, is grimly suggestive that the death of these old people would very soon end defendants' obligation to provide even these niggardly items. Not only do we consider this unsecured agreement for support grossly inadequate consideration for the deed, but we are also convinced that the plaintiffs were deceived as to the character and nature of the instrument signed. It is true they were read to them by the notary in their own language. With persons of ordinary intelligence, this would be sufficient, but is not under the facts as they here appear. *Selden* v. *Myers*, 20 How. 506. An actual understanding of the meaning of the instrument must appear before there can be a binding assent. As well might a claim of knowledge of the contents of a written instrument be based upon proof that it was exhibited to one who was blind, or read to one who was deaf, as to rely upon an interpretation thereof to persons who, from mental infirmity and dense ignorance, are not able to understand its meaning. Plaintiffs say that they understood they were making papers providing for their old age, and nothing more, and that this understanding came from what the defendants had said to them, and from what Hunger explained to them in the store, and that they did not know they were deeding the land away. Every circumstance tends to satisfy us that these statements are true. It is not conceivable that plaintiffs would willingly and knowingly part with the

title to this land, which was their all, not even reserving a place to live, and to this daughter, whose cruelty they had felt, for the unsecured pittance which the contract promised them. We not only find that the consideration was grossly inadequate, but, further, that the plaintiffs did not understand the nature and effect of the deed, and that their signatures thereto were obained through the controlling influence of their daughter and her husband, by misrepresenting and concealing its true character as an absolute conveyance, and that the defendant Latzky had entire knowledge of the manner in which the deed was obtained, and that it was without consideration. A court of equity will not permit such a transaction to stand. The judgment of the District Court is in all things affirmed. All concurr.

(80 N. W. Rep. 686.)

B. S. RICKS *vs.* AMUND BERGSVENDSEN.

Opinion filed October 23, 1899.

Appeal and Error—Trial Without Jury—Statement of Case.

In actions tried in the District Court without a jury, under the provisions of Chapter 5 of the Session Laws of 1897, a statement of the case must be settled on appeal, embracing either a specification of particular facts which the appellant desires this Court to review, or a statement that the appellant desires a review of the entire case in this Court.

Settlement of Stated Case—Specifications.

Applying this rule to the facts of this case, *held*, that this Court is without authority or legal right to try this case anew in this Court, because it does not appear that any statement of the case proper was ever settled, and because the bill of exceptions in the record embraces none of the requisite specifications which are essential to a trial anew in this Court.

Notice of Appeal Cannot Supply Defect in Statement.

The notice of appeal, and also the certificate of the trial court, stated, in effect, that the appellant desired a trial anew in this Court. *Held*, construing the provisions of said statute, that such statements are inoperative, and do not confer authority upon this Court to review the case upon the evidence. Following Bank v. Davis, 8 N. D. 83, 76 N. W. Rep. 998.

Appeal from District Court, Ramsey County; *Morgan*, J.

Action by B. S. Ricks against Amund Bergsvendsen. Judgment for defendant, and plaintiff appeals.

Affirmed.

E. A. Maglone, for appellant.

Siver Serumgard, for respondent.

WALLIN, J. This action is for equitable relief and was tried below without a jury. The record certified to this Court shows

that the trial court filed its findings on July 30, 1898, and that on said date counsel for plaintiff filed certain exceptions to such findings, and also filed certain proposed findings in plaintiff's favor, which proposed findings were rejected by the trial court, to which ruling plaintiff's counsel duly excepted. The trial court, on said 30th day of October, made the following order: "The Court, having examined each and all of the foregoing exceptions, hereby allows the same, and the whole thereof, and the same are ordered brought up on the record herein and made a part of the judgment roll." It further appears that judgment was entered pursuant to the findings, on October 26, 1898, and plaintiff served notice of appeal from the judgment on November 5, 1898. Said notice stated that the plaintiff "demands that the above-entitled action be tried anew by said Supreme Court, under the provisions of Article 8 of Chapter 10 and Chapter 14 of the Code of Civil Procedure and Chapter 5 of the Session Laws of 1897." The presiding judge has appended to the record a certificate, dated July 24, 1899, the material language of which is as follows: "That the annexed and foregoing is the original judgment roll, together with the original pleadings or copies thereof, and the evidence as offered and taken at the trial of this action, and the whole thereof." To all of the papers the clerk of the District Court annexed the statutory certificate required on appeals, but such certificate embraces no reference to a statement of the case. No judge's certificate naming and identifying the papers is found in the record. The record so transmitted to this Court embraces the judgment roll proper; the exceptions to the findings; also the proposed findings rejected by the trial court; likewise the evidence offered at the trial; but there is no reference in the record to any statement of the case, and no certificate, stating that any statement was ever settled, is found in the record as transmitted here by the clerk of the District Court. In the abstract filed in this Court by plaintiff's counsel, we find what purports to be a certificate, signed by the judge who presided at the trial, and which is dated July 21, 1899. The certificate is as follows: "I, D. E. Morgan, judge of the District Court in and for the Second judicial district of the State of North Dakota, do hereby certify and allow the foregoing as a true bill of exceptions in the above-entitled action, and that the same contains all of the testimony and evidence offered in the trial of said action, all the exceptions taken, and is a true and correct copy thereof; that the same is settled within the time extended therein; that said plaintiff desires a trial de novo in the Supreme Court. Dated this 21 day of July, 1899." Nothing similar to this certificate is contained in the record. But if it were conceded that the certificate was intended to be appended to the record proper, and that it was attached to the abstract by a mistake, the plaintiff would be in no better position in this Court. Nor would it cure the radical defects in the record to concede the further fact that the trial court in the certificate found in the abstract intended to certify, not that a "true bill of exceptions"

was "settled within the time extended," but that a statement of the case, embracing all the evidence offered at the trial, was so settled.

The record, if so construed and considered most favorably to the appellant, is still fatally defective, as a basis upon which a new trial in this Court can be had. If the bill of exceptions, as actually found in the record, should be treated as a statement of the case by this court, it would be wholly useless as such, because it omits to specify therein any question of fact which plaintiff desires this Court to review, and fails also to state that the appellant desires to "review the entire case." The case was tried under Chapter 5 of the Laws of 1897, and is governed by its provisions, which are unambiguous and simple in their requirements. The mandate of the statute is explicit and inexorable. The statement itself must contain the specifications as above indicated, and this Court so held in *Bank* v. *Davis,* 8 N. D. 83, 76 N. W. Rep. 998. Nor does the statute admit of a construction to the effect that the required specifications can be incorporated either in a notice of appeal or in a judge's certificate, as was attempted here. Such is not the language of the statute. A simple observance of the provisions of the statute of 1897, in making up the record sent to this Court, would have insured a retrial of the action in this Court upon the merits; but, upon the record as it exists, no review of the case upon the evidence can be had without a violation of the existing law, permitting this Court to sit as a trial Court in certain cases only. The exceptions filed below were wholly superfluous, and could not be considered in this court, even if the whole case could be reviewed. See *Bank* v. *Davis,* supra.

The bill of exceptions embracing the evidence being disregarded, —as it must be,—there is nothing left before this Court for consideration save the judgment roll proper, viz: the pleadings, findings, and judgment. Counsel for appellant has assigned no errors whatever in his brief filed in this Court, and hence we shall rule that plaintiff takes no exception to anything found in the judgment roll proper, when considered aside from the evidence. Finding no error in the record, and the case not being reviewable upon the evidence, this Court will direct an affirmance of the judgment. All the judges concurring.

ON REHEARING.

In this action appellant's counsel has filed a petition for a rehearing, and in connection therewith has requested this Court to withhold the remittitur, and to send down the record, to enable the appellant to apply to the District Court for a resettlement of the so-called "Statement of the Case," with a view of incorporating therein certain essential specifications which were omitted from the original record as transmitted to this Court, and upon which the case was disposed of by this Court. These requests, coming, as they do, after the case has been submitted and decided, and after an opinion has been written and filed, are not seasonably made. Without holding that this Court is devoid of authority to grant

such a request, under any possible state of facts, we do, without hesitation, hold that similar requests will ordinarily be denied, and will not be granted in any case, unless it presents features which are peculiar and very exceptional, and such as this case does not present. Counsel cites section 5625 of the Revised Codes, and claims that, under said section, it is the duty of this Court to transmit the record, with a view to the perfection of the appeal, and to make the same effectual. But counsel in this case in not seeking to perfect the appeal or to make it effectual. The validity of the appeal is not at all involved in any object which counsel is seeking to attain. The citation is therefore not in point. The petition for a rehearing and the said requests of counsel are denied. The other judges concurring.

(80 N. W. Rep. 768.)

J. A. PAINE *vs.* DICKEY COUNTY.

Opinion filed October 24, 1899.

Taxation—Statutes—Subject and Title.

Section 84 of Chapter 132 of the revenue law of 1890 considered, and construed with reference to its constitutionality under section 61 of the state constitution; and *held*, that the provisions in said section allowing illegal taxes to be recovered from the county which have been paid into the county treasury at tax sales made under the provisions of said act are germane to the subject of the act, as expressed in its title, and hence such provisions are not repugnant to section 61 of the constitution. Said provisions aid in the collection of taxes, in this: that they offer an additional inducement to purchasers to bid at tax sales held under the provisions of the act. The case of Divet v. Richland Co., 8 N. D. 65, 76 N. W. Rep. 993, distinguished.

Liability of County to Refund Illegal Taxes.

Held, further, that, where the illegality of the taxes is determined in an action between other parties, the statute does not contemplate that the county is to have notice of the pendency of such action, or be made a party thereto. The judgment in any such action is prima facie valid, and is conclusive upon the question of the liability of the county, at least until the same is attacked, and shown to have been illegally or collusively obtained.

Appeal from District Court, Dickey County; *Lauder*, J.

Action by J. A. Paine against Dickey County. From an order sustaining a demurrer to the complaint, plaintiff appeals.

Reversed.

J. E. Robinson, for appellant.

E. E. Cassels (*R. W. S. Blackwell*, of counsel), for respondent.

WALLIN, J. This action is brought, under section 84 of the Revenue Law of 1890, to recover certain amounts paid into the defendant's treasury for land sold for taxes in said County of

Dickey at the tax sales of 1890 and 1891, with interest thereon, as provided in said section. The material facts stated in the complaint and admitted by the demurrer are as follows: The lands described in the complaint, at the time the taxes in question were assessed and levied, were not subject to taxation, and for that reason said taxes were illegal and totally void. Nevertheless said lands were sold for such illegal taxes, and struck off to purchasers, who paid into the defendant's treasury on account of such sales the several amounts as stated in the complaint. Said lands were not redeemed, and pursuant to the sales the county auditor of the defendant made and delivered to the plaintiff, who then held the tax certificates, tax deeds of said lands. Subsequently the plaintiff commenced an action in the District Court for Dickey county, to recover the possession of the lands described in the tax deeds, against one Samuel Glover and other parties, and in said action a judgment was entered prior to the commencement of this action. In said action it was adjudged and determined that said taxes, tax sales, tax certificates, and tax deeds were illegal and wholly void for the reason that said lands at all times in question were the property of the United States, and hence not then subject to taxation. It is conceded that the tax sales were made under the provision of the Revenue Law of 1890. The material provisions of the section under which this action is brought are as follows: "When a sale of land, as provided in this act, is declared void by judgment of court, the judgment declaring it void shall state for what reason such sale is declared void. In all cases where any such sale has been or hereafter shall be so declared void, or any certificate or deed issued under such sale shall be set aside or cancelled for any reason, the money paid by the purchaser at the sale and all subsequent taxes and penalties and costs paid by such purchaser or assignee shall, with interest at the rate of 10 per cent. per annum from the date of such payment be returned to the purchaser or assignee, or the party holding his right, out of the county treasury," etc. This statute in plain terms gives a right of action against the county to recover the money paid at tax sales made under the act of 1890, and also the interest thereon, with subsequent taxes, when such sales are declared void by the judgment of a court, provided the court has, in its judgment, declared the ground or reason why the sale is declared void. It appears that all the prerequisite conditions of fact upon which a recovery is allowed under section 84 are shown to exist in this case, and counsel for the respondent advance but two grounds upon which it is contended that the plaintiff ought not to recover.

Counsel contend, first, that section 84 is unconstitutional in so far as it authorizes the recovery of money paid as taxes which have been declared void by the judgment of a court. Counsel cite in support of this point section 61 of article 2 of the State Constitution, which declares that "no bill shall embrace more than one subject, which shall be expressed in its title," etc. Counsel call attention to

the language of the title of the Revenue Law of 1890, and argue that the provisions of section 84 relating to the recovery from the county of moneys paid for illegal taxes are not germane to such title. Counsel cite, among other authority, the case of *Divet* v. *Richland Co.*, 8 N. D. 65, 76 N. W. Rep. 993, in support of this contention; and the argument of counsel upon this point consists of a reproduction of the views of this Court as expressed in the opinion handed down in the case cited. Counsel contend that the subject of the act which the Court considered in that case, namely, Chapter 126, Laws 1897, was the same, and the language of the title was the same, in the Revenue Law of 1890, under which this action arose. So far we agree with counsel, but the case cited is not in point here, and can be readily distinguished from the case at bar. Section 88 of the Laws of 1897 was construed in the Richland County Case, and our holding was, in effect, that, in so far as section 88 of that statute permitted the recovery of illegal taxes paid into the county treasury prior to the enactment of the statute, the same was unconstitutional and void, because such provisions were repugnant to the subject of the law as expressed in its title. In that case the Court was dealing wholly with causes of action which arose prior to the passage of the law of 1897, under which alone the plaintiff sought to recover. The terms of that law, unlike those of the law of 1890, were clearly retroactive. This Court was careful, in deciding that case, to refrain from expressing any opinion upon a possible case which might arise under that act, where the payment of taxes was made upon sales had under the provisions of that act. In this connection the Court said, "We are therefore not called upon to determine, and do not determine, whether the act in question is equally open to objection on constitutional grounds when applied to causes of action arising upon a different state of facts." We are clear, after further consideration, that the Richland County Case was properly decided, but the language of the opinion in that case should be read with reference to the facts which limited the language, and confined it to causes of action arising before the act of 1897 was passed. In the case at bar we are dealing with causes of action arising upon tax sales made under the revenue law of 1890, which law, as we have said, is prospective only in its operation. See *Tyler* v. *Cass Co.*, 1 N. D. 369, 48 N. W. 232. The case therefore is easily distinguished in its facts from the case cited by counsel. With reference to the constitutionality of section 84 of the Laws of 1890, we are to determine whether the provisions of that section are cognate with the subject of the act as expressed in its title. We see nothing in the provisions of section 84 which is repugnant to the general purposes of the law or to its title. The capital purpose of the statute as a whole is to raise public funds by means of taxation. The processes of taxation embrace the assessment, levy, and collection of taxes. The question to be decided then is, do the provisions of section 84 relate to any feature or step in the processes of taxation as pre-

scribed in the act? We are of the opinion that this question must receive an affirmative answer. One mode of collecting taxes upon land laid down in the statute is that of selling the land at public sale for delinquent taxes due thereon. But sales cannot be made without first finding purchasers, and, to do so, there must be some inducement held out to bidders sufficiently persuasive to induce them to invest at tax sales. We think that the provisions of section 84 which allow a purchaser at a tax sale to recover what he has invested, with a reasonable interest, in the event that the courts shall decide that the sale at which the money is paid was illgal and that the muniments of the title delivered to the purchaser are worthless, are such as are directly calculated to induce purchasers to come forward and bid at tax sales. Under these provisions the bidder is at least assured of a return of his principal, with fair interest added. This being so, these statutory provisions are germane to the matter of collecting the taxes on land by means of a sale thereof. Such statutes, or those having the same general purpose, are now quite commonly found in the laws of many states, and we think their chief object is to aid in collecting the revenue. See, on this point, *Fleming* v. *Roverud,* 30 Minn. 273 (opinion 275), 15 N. W. Rep. 119.

But respondent's counsel contend, secondly, that a recovery from the county ought not to be had until the county has had notice, or been made a party in some action in which the primary question of the illegality of the taxes sought to be recovered is adjudicated. Counsel say in their brief that "no one shall be condemned or concluded as to his rights of person or property unheard." And further counsel say, "When a person is responsible over to another, either by operation of law or by express contract, in order that he may be bound by the result of the action he must be made a party to it, or be notified of its pendency and afforded an opprotunity to defend his interest." In support of this general proposition of the law of indemnity, counsel have cited abundant authority,—among others, Black, Judgm. § 574, and *Tierney* v. *Insurance Co.,* 4 N. D. 565, 62 N. W. Rep. 642. But this Court has reached the conclusion that the principles announced by these authorities cannot be invoked to shield this defendant from liability. If it were true, as counsel contend,—and we are clear that it is not,—that the defendant is in the position of an obligee in an indemnity bond, and as such is entitled to notice and an opportunity to defend in the original suit, the defendant would be in no better position. In the case supposed, the judgment entered in the original action would be prima facie valid as against the obligee. In this case there is no claim made that the defendants in the original action failed to avail themselves of any good defense, or that the judgment was obtained by fraud or collusion. If the defendant's position were analogous to that of an obligee not having notice of the pendency of the prior action, the judgment would be binding nevertheless until it was attacked; and in this case it

does not appear upon the record that the District Court judgment was ever attacked in fact, or that it was vulnerable to attack. See *Train* v. *Gold,* 5 Pick. 380; *Insurance Co.* v. *Wilson,* 34 N. Y. 275. But, in our opinion, the principles governing defendant's liability differ widely from those applicable in indemnity cases. The right of the plaintiff to recover the amount of illegal taxes paid into the defendant's treasury, with interest, is a right arising upon a contract. When the money sued for was received by the county, the statute from which we have quoted was in force, and its substantial provisions constituted a contract binding upon the parties, and under which the plaintiff secured a valuable right. This contract is so sacred in the law that even the legislature could not abrogate it by subsequent legislation. See *Fleming* v. *Roverud,* supra; *Roberts* v. *Bank,* 8 N. D. 504, 79 N. W. Rep. 1049. The law, which is the contract, declared, in effect, that illegal taxes upon land paid by a purchaser at a sale under the provisions of the law should be refunded, with interest, upon the condition precedent stated in the statute, namely, that the illegality of the tax should be first adjudged by the courts. The record in this case shows that this condition has been met; hence the liability arises. In the case at bar the liability to refund is both legal and moral. The county had neither the legal nor the moral right to levy or collect taxes upon govenment land, or sell the land for their payment. It was to provide for such a state of facts, and others similar thereto, that the law in question was enacted; and it was entirely competent for the legislature (having plenary power in the premises) to determine in advance the conditions upon which illegal taxes paid into defendant's treasury should be refunded. It follows that the demurrer to the complaint was improperly sustained, and the trial court will be directed to reverse its order sustaining the demurrer, and enter an order overruling the same. All the judges concurring.

(80 N. W. Rep. 770.)

E. I. DONOVAN *vs.* ST. ANTHONY & DAKOTA ELEVATOR COMPANY.

Opinion filed October 25, 1899.

Chattel Mortgages—Execution—Mortgagee as Witness.

A mortgagee is disqualified from being one of the two witnesses to a chattel mortgage required by section 4738, Rev. Codes, by reason of being an immediate party to the instrument.

Filing—Effect as Notice.

The filing of a chattel mortgage which is witnessed only by the mortgagee and one other person does not operate to give constructive notice of its existence.

Appeal from District Court, Cavalier County; *Sauter,* J.

Action by E. I. Donovan against the St. Anthony & Dakota Ele-

vator Company. Verdict for defendant, and from an order granting plaintiff a new trial defendant appeals.

Reversed.

Cochrane & Corliss, for appellant.

J. C. Monnet, for respondent.

YOUNG, J. But one question is presented by this appeal, and that is whether a mortgagee in a chattel mortgage is qualified to act as an attesting and subscribing witness to its execution. Briefly, the preliminary facts are these: Plaintiff has a chattel mortgage covering a quantity of wheat which was purchased and received by the defendant from plaintiff's mortgagor, and admittedly without actual notice of plaintiff's mortgage thereon. The mortgage is properly signed by the mortgagor. To the left of his signature is the attestation, first, the words, "Signed, sealed, and delivered in the presence of," and just underneath them the signatures of the two witnesses, E. I. Donovan and Charles C. Keenan. Donovan is the mortgagee, and is so named in the instrument. The mortgage was filed in the proper office. Plaintiff sues for the alleged conversion of the grain. At the trial in the District Court a verdict was directed for the defendant upon the ground that the mortgage was not witnessed as required by law, and that the filing thereof did not, therefore, impart constructive notice of its existence. Later a new trial was granted, upon plaintiff's motion. This appeal is from the order granting a new trial.

It is apparent that in reversing his former conclusion the District Judge was controlled by the recent case of *Fisher* v. *Porter* (S. D.) 77 N. W. Rep. 112, in which that court, in passing upon this identical question, and under statutes which are the same as those in force in this jurisdiction, held squarely that it is competent for a mortgagee to witness his own mortgage. Section 4384, Comp. Laws, is the same in language as section 4738, Rev. Codes, and reads as follows: "A mortgage of personal property must be signed by the mortgagor in the presence of two persons, who must sign the same as witnesses thereto, and no further proof or acknowledgment is required to admit it to be filed." After quoting this section, the South Dakota Court said: "Manifestly, the foregoing provision should be construed with reference to the law of the state relating generally to the competency of witnesses, and unless some limitation can be found as to the character of the persons in the presence of whom the mortgagor must sign his name, and by whom a chattel mortgage must be witnessed, we would not be justified in holding that a mortgagee, on account of his interest, is not a person, in contemplation of the statute, authorized to become a subscribing witness. Under a statute like ours, requiring, without any restriction, that a chattel mortgage, in order to be filed, must be witnessed by two persons, and providing that no person offered as a witness can be excluded or excused from testifying on account of his interest in the event of the action or proceeding, we perceive no

valid reason for holding a mortgagee disqualified as an attesting or subscribing witness. Comp. Laws, § 5260. It seems entirely consistent with the legislative aim to hold that a person who would be a competent witness in an action involving the subject-matter of a deed or mortgage has the legal capacity to become a subscribing witness thereto; and, under statutes measurably less compatible with the doctrine than our own, it has been so held. *Johnson* v. *Turner*, 7 Ohio, 216; *Welsh* v. *Lewis*, 71 Ga. 387; 2 Jones, Real Prop. 1099; Webb, Record Titles, 127." This decision evidently stands alone in announcing such a conclusion, for neither the exhaustive research of counsel, nor our examination of the authorities has discovered a single case making a similar holding as to the competency of a mortgagee to attest the execution of his own mortgage. Further, the decision is not supported by the two cases upon which it purports to be based. In neither case was the question of competency of the immediate parties to the instrument to act as attesting witness involved. In *Welsh* v. *Lewis*, 71 Ga. 387, the holding was merely that it was not illegal for a brother-in-law of the mortgagee to witness the mortgage. In *Johnson* v. *Turner*, 7 Ohio, 216, pt. 2, it was objected that one of the subscribing witnesses to a certain trust deed to a banking corporation was disqualified as an attesting witness by reason of being a stockholder. Because of that interest, he was excluded from testifying as a witness as to such deed under the law then prevailing in that state. Nevertheless the court held him competent to attest the deed, utterly repudiating the doctrine that the test is competency to testify in court; using this language: "The statute (volume 31, p. 346, § 1) requires the deed to be executed 'in the presence of two witnesses, who shall attest such signing and sealing and subscribe their names to such attestation.' Unless the express provisions of this statute, or its plain inference, lead to the conclusion that the witnesses to a deed must be credible and competent to prove its execution at the time of their attestation, and that such was the intention of the legislature, reluctantly indeed would this Court adopt such an opinion. If such be the law, it is time to look around us and ascertain by whom our deeds bear witness. Who ever instituted an inquiry, when a witness was called to attest a deed, whether he was competent or incompetent to testify in a court of justice; whether persons might not subsequently be found who would impeach him for the want of character for truth; whether conviction for crime, or the want of a correct opinion of the providences of God, according to the notions of others, might not exclude him from giving evidence? Precarious indeed are our titles, if such is the principle to be established. * * * The plaintiff's counsel have very properly said the statute is silent as to the qualities of the witnesses. It neither requires them to be competent to testify, white, credible, disinterested, of proper religious belief, nor innocent of crime, but leaves the grantor at liberty to select such persons as he sees proper." The case of *Smith* v. *Chamberlain*, 2 N. H.

440, cited by the Ohio Court, fully sustains their views. Not only are the Georgia and Ohio cases not in point, but the Supreme Court of Ohio decided very recently, in the case of *Amick* v. *Woodworth*, 50 N. E. Rep. 437, directly to the contrary from the holding of the South Dakota Court,—holding that a mortgagee was not qualified to attest his own mortgage. The Court in that case said: "The true reason of the disqualification, we apprehend, is that, to permit a grantee to attest as a witness the execution of an instrument made to himself, or take its acknowledgment as an officer, where its attestation and acknowledgment are necessary to give it validity, would be against public policy, and practically defeat the real purpose of the law, which is to prevent the perpetration of frauds on grantors, and afford reasonable assurance to those who deal with or on the faith of such instruments that they are genuine and represent bona fide transactions;" adding that "it is probably unnecessary to notice that this question was not involved in *Johnson* v. *Turner*, 7 Ohio, 216, and that case is unaffected." That a mortgage cannot be attested by the mortgagee was also decided by the Supreme Court of Alabama in *Selbold* v. *Rogers*, 18 South. Rep. 312,—a chattel mortgage case. See, also, *Coleman* v. *State*, 79 Ala. 49.

There is a line of authorities, however, and we think the majority of cases hold, that persons who are not competent to testify in court are not qualified to act as attesting witnesses. Recent legislation has made it possible for all persons interested in the execution of deeds or mortgages to testify concerning them, including the parties to the instruments. Therefore all persons can attest their execution. Such is the reasoning of the South Dakota Court. But this conclusion, in our judgment, is too sweeping, in including the parties to the instruments attested; for their disqualification to attest does not, and never did, depend upon their competency or incompetency to testify in court relative to the instruments, but exists in the very nature of things,—in the inherent impossibility of the immediate parties to a written contract to assume the attitude of strangers and spectators to its execution, which, we take it, is necessary in attesting witnesses. We might, then, following one line of cases, ask: "Were the subscribing witnesses competent to testify in court?" But, before the answer would be decisive, it must also appear that such persons were not incapacitated by being the immediate parties to the instrument to be attested. In *Smith* v. *Chamberlain*, 2 N. H. 440, that Court, in discussing a statutory provision requiring a deed to be attested by two witnesses, said: "We have been much at a loss to conjecture why two witnesses were in this instance required by statute. Surely they were not intended to be placed round a grantor for the same reason they are placed round a testator. The most plausible conjecture is that it was intended to render the proof of the instrument more certain. If this were the object, there is good reason to suppose that the word 'witnesses' was in this instance used in the simple sense of spectators of the transaction." The act required of witnesses to chattel mort-

gages by our statute is merely the attestation common in most of the states as means of proving instruments for record, or as component acts in their execution necessary to give them validity as the particular statute provides. It is "to signify by subscription of his name that the signer has witnessed the execution of the particular instrument." 3 Am. & Eng. Enc. L. (2d Ed.) 274. In *Seal* v. *Claridge*, 7 Q. B. Div. 516, Lord Selbourne, in answer to an inquiry as to the meaning of the word "attestation," said: "The word implies the presence of some person who stands by, but is not a party to the transaction," and elsewhere in the same case used this language: "I was at first surprised that no authority could be found directly in point, but, no doubt, the common sense of mankind has always rejected the notion that a party to a deed could also test it." The South Dakota case makes cometency to testify in court the sole test of capacity to attest. If we should accept this interpretation, and apply it to the case at bar, our holding would be that a mortgage whose execution is attested by the mortgagee and one outsider is properly attested, under the statute. This nullifies the statute, and amounts to a declaration that no outside witnesses are required. For instance, a mortgage is given by two persons to a third. The mortgagee may attest, and the mortgagors, one for the other. Then a person may give one mortgage to two persons. These two may furnish the attestation. In both cases the statute is complied with, as construed by the South Dakota case. We cannot adopt either this reasoning or conclusion. The legislature had a purpose in requiring two attesting witnesses to chattel mortgages as a prerequisite to their filing as public records. The primary object, no doubt, was to afford satisfactory proof to the recording officer of the genuineness of the instrument; but, aside from this, it was also to provide a guaranty to the public at large of the bona fides of the transaction. The signatures of the parties to the mortgage in the space for witnesses furnish no additional proof to the register of deeds as to the execution of the mortgage, and add nothing to the means by which the public may judge of its integrity. But not only is the construction contended for by respondent repugnant to the intent and purpose of the statute, but is, we think, entirely out of harmony with its language, as commonly understood; for we think men generally understand it to mean the calling in of a person who is not a party to the transaction to hear and see its consummation, and subscribe his name as a witness to what the parties have in his presence consummated, and that parties to the contract are disqualified to act in that capacity; and such is the weight of authority. A mortgagee cannot, therefore, witness his own mortgage. The mortgage in question has then but one witness. The statute requires two, to admit it to filing, and there are no exceptions. The mortgage was not entitled to be filed, and the fact that it was filed did not operate to give constructive notice of its existence. The order granting a new trial is reversed. All concur.

(80 N. W. Rep. 772.)

A. V. OLIVER *vs.* CHARLES E. WILSON.

Opinion filed October 25, 1899.

Mandamus Will Not Lie to Control Official Discretion.

In cases where a defendant makes formal demand for his exemptions upon an officer who has seized defendant's chattels under a warrant of attachment, the officer is bound to exercise discretion with respect to turning over the property claimed as exempt; and in all cases where the officer is convinced that, for any reason, the claimant is, under the law, not entitled to exemptions, he is in duty bound not to comply with a demand therefor. Accordingly, *held*, that mandamus will not lie to compel the officer to exercise his official discretion in favor of the claimant, and turn over property so demanded. Mandamus will not lie against ministerial officers to compel the exercise of an official discretion in a particular manner.

Trover for Conversion of Exempt Property.

Held, further, that, in cases where an officer unlawfully refuses to turn over exemptions, a civil action in the nature of trespass, trover, or replevin will lie against him and his bondsmen for such refusal.

Adequate Remedy in Motion to Dissolve Attachment.

Held, further, that the defendant has an additional remedy by motion to discharge the attachment in cases such as this, where the seizure is made by warrant of attachment. If the motion is granted, the property will be relieved from the levy; and this, in such cases, affords a speedy and adequate remedy to the claimant.

Appeal From Judgment Before Entry Premature.

After a hearing upon the merits, the trial court directed its clerk to issue a peremptory writ of mandamus, and also, in the same order, directed the entry of judgment in favor of the plaintiff for his costs and disbursements. After the service of said order, such judgment was entered; but prior to the entry of such judgment, and subsequent to the service of the order, the defendant served a notice of appeal to this Court, stating therein that the appeal was taken both from the order directing the writ to issue and from the judgment. *Held*, upon these facts, that the appeal was premature and inoperative, as to the judgment; and *held*, further, that said order is an appealable order, inasmuch as it is "a final order affecting a substantial right made in a special proceeding." See subdivision 2, § 5626, Rev. Codes. Motion to dismiss the appeal denied as to such order.

Printed Abstracts and Briefs—Court Rules.

The abstracts and briefs filed in this Court were typewritten, and the brief contained no reference to the pages of the abstract. Respondent moved to dismiss the appeal because the abstracts and briefs were not printed, and for said defect in the briefs. These grounds furnish no reason for dismissing an appeal; following State v. McKnight, 7 N. D. 444, 75 N. W. Rep. 790. Motion is denied as to this ground.

Appeal From Order in Special Proceeding.

The order appealed from was made upon an application based wholly upon certain papers and documents, and all such papers and documents were transmitted to this Court with the original order;

no oral evidence being offered upon the application for the order. No statement of the case was settled. In this Court, counsel for respondent moved to strike from the records certain papers and documents, on the ground that the same could not properly be transmitted to this Court on appeal from the order, in the absence of a statement of the case. Motion denied. See section 5607, Rev. Codes, and Bank v. Gilmore, 3 N. D. 188, 54 N. W. Rep. 1032.

Appeal from District Court, Cass County; *Pollock*, J.

Application by Mrs. A. V. Oliver for a writ of mandamus against Charles E. Wilson, sheriff. From an order directing the writ to issue, and judgment to be entered against defendant, and from a judgment so entered, defendant appeals.

Reversed.

Barnett & Reese, for appellant.

Respondent had an adequate and speedy remedy at law, hence was not entitled to mandamus. *State* v. *County Judge*, 5 Iowa, 380; *Inhabitants* v. *Mulliken*, 7 Gray, 280; *Peo.* v. *Chase*, 70 Ill. App. 42; *Wright* v. *Kelley*, 42 Pac. Rep. 565; *Foster* v. *Angell*, 33 Atl. Rep. 406; *Bickley* v. *Esendworth*, 58 Ill. 364; *State* v. *Beaver*, 143 Ind. 488; *State* v. *Smith*, 38 Atl. Rep. 811; *Wildwald* v. *Dodson*, 30 Pac. Rep. 580. The writ will not issue to control an official discretion. *Wells* v. *Monroe*, 38 Atl. Rep. 897. And where as in this case the facts relied upon by the relator are denied, the writ will not issue. *In re McDonald*, 39 N. Y. Supp. 367.

Morrill & Engerud, for respondent.

The other remedy which will prevent the issue of a writ, must be a remedy which like the writ of error or appeal will set aside and annul the void proceeding of which petitioner complains. *State* v. *Rose*, 4 N. D. 319, 58 N. W. Rep. 514. Mandamus is a proper remedy to enforce the exemption right. *State* v. *Wilson*, 48 N. W. Rep. 147.

WALLIN, J. The record in this proceeding discloses that the plaintiff made application to the District Court for a peremptory writ of mandamus, basing said application upon her own affiadvit, which is, in substance, as follows: That an action was then pending in the District Court for Cass county for the recovery of rent, wherein this plaintiff was defendant, and Northern Light Lodge No. 1, etc., a corporation, was plaintiff; that in said action a writ of attachment had issued, and been delivered to defendant herein for service as sheriff; that defendant had, by virtue of said writ, levied upon and seized a certain piano and piano stool belonging to this plaintiff; that within proper time, and in conformity to the statute regulating exemptions, this plaintiff caused to be served upon the defendant a verified schedule of all of her personal property, and demanded of the defendant that he set aside to this plaintiff her personal property exemptions to the amount of $1,500, and in said notice appointed one Brown as one of the appraisers of said property. The affidavit further set out that said civil action was

not brought for labor or physician's services, or for property obtained under false pretenses, and that the plaintiff is a married woman, residing in the County of Cass and State of North Dakota, and has two minor children depending upon her for support, and living with her; and finally it is set out in the affidavit that the defendant has neglected and refused to recognize plaintiff's said claim for exemptions, and refused to cause said property to be appraised or set apart to plaintiff. The affiant asked the trial court to issue the peremptory writ, and thereby compel the defendant to proceed under the exemption law, and cause said property to be appraised, to the end that plaintiff might select her exemptions therefrom. Upon said affidavit an order to show cause was issued, and both the affidavit and order were served upon the defendant, requiring the defendant to show cause why the writ of mandamus should not issue as prayed for in said affidavit. At the hearing of the order to show cause the plaintiff offered in support of her application for the writ the said affidavit of this plaintiff and the order to show cause, and offered no other evidence, whereupon the defendant, by his attorneys, interposed objections to issuing the writ of mandamus, in substance, as follows: First, that the plaintiff has not set out in her affidavit sufficient grounds or reasons for granting the writ; second, that the plaintiff has a speedy and adequate remedy at law. These objections were overruled by the trial court, whereupon the defendant offered in evidence the complaint, and also the affidavit for attachment, in the civil action aforesaid. These papers, which were received in evidence without objection, need not be set out in detail. The complaint stated a cause of action for the recovery of rent. The affidavit for attachment ment was drawn under subdivision 3-5, § 5352, Rev. Codes. Upon this evidence the trial court made an order to the effect that the clerk of the District Court should forthwith issue the writ, substantially as prayed for in plaintiff's affidavit therefor; and said order further directed said clerk to enter a judgment for costs and disbursements in plaintiff's favor, to which order the defendant excepted. Subsequently, and on March 7, 1899, the defendant caused a notice of appeal to this Court to be served, and such notice stated that the appeal was taken both from the order and from the judgment.

In this Court the respondent has made a preliminary motion to dismiss the appeal upon the following grounds: First, that an appeal does not lie from an order granting a peremptory writ of mandamus; and, second, that the attempt to appeal from the judgment was premature; and, finally, upon the ground that no printed abstracts or briefs have ever been served, and that the typewritten briefs actually served do not contain assignments of error which refer to pages of the abstract.

It appears that the notice of appeal was served after the order directing the writ to issue had been served on counsel for the defendant, but such notice was served a few hours prior to the entry

of the judgment by the clerk of the District Court. From this it follows that the appeal from the judgment was premature, and we therefore sustain the motion to dismiss, so far as it relates to the judgment. But, in our judgment, the appeal, so far as it relates to the order, was properly taken, under the provisions of subdivision 2, § 5626, Rev. Codes. The order was a final order affecting a substantial right, and was made in a special proceeding. It was final in the sense that no further order could be made in the special proceeding. Certainly none could be made prior to the entry of judgment. It is true (and this Court has so held) that a mere order directing the entry of judgment in an action is not appealable. See *In re Weber*, 4 N. D. 118, 59 N. W. Rep. 523; *Field* v. *Elevator Co.*, 5 N. D. 400, 67 N. W. Rep. 147; *In re Eaton*, 7 N. D. 273, 74 N. W. Rep. 870. But the case at bar is readily distinguishable from the cases cited, and must be determined upon the express language of the statute regulating appeals from final orders in special proceedings. No similar language is found in the statute relating to final orders directing the entry of judgments in civil actions. We suggest here, however, in the interests of good practice, that the statute now contemplates the entry of a judgment in a mandamus proceeding, and this accords with the practice in the State of New York. The judgment, in our opinion, should award the writ, as well as adjudicate upon the costs, in cases where the final order so directs. On appeal from such judgment, the order could be reviewed and the whole case disposed of. See Rev. Codes, § § 5578, 5585, and especially § 6120.

The next ground of the motion to dismiss the appeal is based upon the fact that the abstracts and briefs served were typewritten, and that the briefs served were further defective in that they did not refer to pages in the abstract. It will be noticed that counsel does not claim that abstracts and briefs were not served by appellant within time. His objection goes entirely to their structure and make-up. But this ground affords no reason for dismissing an appeal to this Court. Rule 39, Amended Court Rules, will authorize this Court in its discretion to dismiss an appeal when there is a failure to comply with the requirements of the rules "within the times therein provided." This ground, so far as appears, does not exist in this case, and the motion to dismiss on this ground will therefore be overruled. See Sup. Ct. Rule 12, 6 N. D. xviii, 74 N. W. vii; also *State* v. *McKnight*, 7 N. D. 444, 75 N. W. Rep. 790. It will be unnecessary, in disposing of the motion, to determine the further question whether typewritten briefs may properly be used in special proceedings, and upon that question we express no opinion here.

But counsel for the defendant has also moved in this Court to strike from the files all papers and records other than plaintiff's affidavit for the writ of mandamus, the order to show cause, and the order granting the writ. This motion is made upon the ground that no statement of the case was settled or allowed in the trial court.

This motion must be denied. The appeal being from an order, the clerk of the District Court was required to "transmit the order appealed from and the original papers used by each party on the application for such order." The case at bar does not authorize or call for the settlement of a statement of the case, inasmuch as the evidence offered upon the application for the order consisted of papers and documents only, and no claim is made in this Court that any of such papers or documents are absent from the record transmitted here. Doubtless cases may arise where the settlement of a statement on appeal from an order would be proper, and a necessary practice, but this record presents no such case. See *Bank* v. *Gilmore*, 3 N. D. 188, 54 N. W. Rep. 1032, citing *Bailey* v. *Scott*, 1 S. D. 337, 47 N. W. Rep. 286.

This brings us to a consideration of the merits, and the question first presented is whether mandamus is a proper remedy to compel an officer to turn over exemptions upon the state of facts presented by this record. In our judgment, this question requires a negative answer. The rule is well settled that either an action for conversion, or claim and delivery proceedings, will lie against an officer, where the officer has refused, on proper demand therefor, to turn over exemptions to the debtor. In such an action the sheriff's bondsmen may be joined. At common law, replevin would not lie against an officer in such case, because the property was regarded as being in legal custody, but this obstacle has been removed by statute in this state. See Rev. Codes, § 5332; also, 10 Enc. Pl. & Pr. pp. 101-105, inclusive, and cases cited in notes; also, Thomp. Homest. & Ex. § § 870-894, inclusive. This learned author, in his chapter treating of the remedies to which the debtor must resort for the protection of chattel exemptions, enumerates actions in the nature of trespass, trover, and replevin as the proper legal remedies, but makes no reference to mandamus as a possible remedy in this connection. Counsel for respondent cites one case,—*State* v. *Wilson*, (Neb.) 48 N. W. Rep. 147,—and we concede that the case supports his contention; but our own researches have failed in discovering any other authority to the same effect. The case cited does not embrace citations of authority in its support, and we are convinced that the case is isolated from, and contrary to, the overwhelming weight of judicial opinion. Nor do we think that the Nebraska case is sound in legal principle. In our judgment, the matter of turning property over to a debtor when the same has been formally demanded as exempt, is not infrequently a matter involving the exercise of official discretion. In this state the exemption right is conditioned not only upon the fact of residence, but also upon the fact that the claimant is the head of a family; and there are further conditions enumerated in the code which will defeat the right to claim exemptions. To determine whether, in a given case the claimant is entitled to chattel exemptions, often involves the determination of questions of fact touching the status of the claimant; and in some cases his relation to the property claimed as exempt are

vitally important,—as where the action is for the purchase money, or where the property seized was obtained by false pretenses. In all such cases the officer is bound, at his peril, to exercise an official discretion with respect to turning over property demanded as exempt. The officer ought not to turn it over certainly—if indemnified—in cases where, in his judgment, there is serious doubt of the claimant's right to exemptions. We are therefore of the opinion that mandamus ought not to be resorted to as a remedy in this class of cases. It is, of course, elementary that this extraordinary remedy cannot be resorted to as a means of compelling ministerial officers to act in any case where the officer's action or nonaction depends upon the exercise of an official discretion. High, Extr. Rem. (2d Ed.) § 80; Merrill, Mand. § 110. In the case at bar, counsel for the appellant contend in argument that the relator's status is such that she is not entitled to exemptions, because, as counsel claim, she is not the head of a family, and because she is a nonresident of this state. It appears by the affidavit of the relator that she is a resident of this state, and that she is a married woman, having two children living with her and dependant upon her for support. But these facts, all and singular, may be controverted, and it cannot be assumed that the proper tribunal will determine them either one way or the other. The creditor has a right to show that the debtor is not entitled to exemptions. Nor can an officer be called upon to settle these important questions of both law and fact. They are just such questions as devolve upon the officer the duty of exercising an official discretion. For this reason, as has been said, mandamus will not lie to coerce his official action.

Our conclusion is that the order directing the writ to issue was error, and that said order furnished no legal ground for the entry of a judgment for costs. The order appealed from is reversed, and the District Court will be directed to enter judgment in the appellant's favor, dismissing this proceeding, and for defendant's costs and disbursements in both courts. The other judges concurring.

(80 N. W. Rep. 757.)

GEORGE C. PECKHAM *vs.* W. S. VAN BERGEN.

Opinion filed October 18, 1899.

Equity Cases Tried to a Jury—Appeal—New Trial.

In an equity case, where the District Court calls in a jury for advisory purposes, the trial is not governed by the provisions of section 5630, Rev. Codes, as amended by Chapter 5 of the Laws of 1897; nor does this Court try such cases anew. That statute applies only to such cases as are tried in the District Court without a jury.

New Trial Ordered.

Applying this construction of the statute to the facts of this case, *held*, that the case below was improperly tried, and the case is therefore sent back for a retrial.

Appeal from District Court, Cass County; *Pollock*, J.

Suit by George C. Peckham against W. S. Van Bergen. Judgment for plaintiff, and defendant appeals.

Reversed.

Newman, Spalding & Stambaugh, for appellant.

Leonard A. Rose, for respondent.

WALLIN, J. The relief sought by this action is the surrender and cancellation of two promissory notes executed by the plaintiff and delivered by him to the defendant,—one of said notes being for $500, and the other for $400; also, the cancellation of a certain mortgage covering a house and lot owned by plaintiff, situated at Grandin, N. D., and occupied by plaintiff and his wife as a homestead, which said mortgage was executed by plaintiff and his wife, and delivered to the defendant, as security for the payment of said notes. The complaint alleges, in substance, that said notes and mortgage were given wholly without consideration, and were obtained by duress, undue influence, menace, and fraud practiced upon the plaintiff by the defendant. The answer denies all of these charges, and defendant alleges that the notes and mortgage were voluntarily given by the plaintiff to secure an indebtedness which was in excess of the amount of said notes, and that said indebtedness arose on account of money and property belonging to the defendant which the plaintiff had unlawfully appropriated to his own use. The plaintiff had judgment below, and the defendant, in the statement of the case, has demanded a retrial of the entire case in this Court, under the provisions of section 5630, Rev. Codes, as amended by Chapter 5, Laws 1897.

When the case was called for trial in the District Court, that court announced that it would call a jury, and submit certain questions to them for their verdict,—which verdict, however, the Court stated, would be regarded simply as advisory to the Court. The defendant, by his counsel, objected to the calling of any jury, and to the submission of any evidence to a jury, on the ground that the action was to be tried under section 5630 of the Revised Codes, and that such an action could not lawfully be submitted to a jury. This objection was overruled, and an exception was taken to such ruling. The Court then submitted certain questions in writing to the jury for an advisory verdict, which are as follows: "Was the plaintiff induced by the defendant to execute the notes and mortgage in question (1) by duress; (2) by menace; (3) by fraud; (4) by undue influence?" Defendant here interposed special objections to the submission of said questions to the jury, for the following reasons, viz: That the first called for a conclusion of law, and not a statement of fact; the second is not a proper question to submit to a jury, and is immaterial; and to the fourth, that it is not a proper question to submit to a jury, and calls for a conclusion of law. All of the said objections were overruled by the trial court, and defendant excepted to the ruling. Upon the issues so submitted the

respective parties introduced testimony, and the case was argued by counsel to the jury. The Court then instruced the jury, but, inasmuch as such instructions are not embodied in the abstract filed in this Court, we have no means of knowing their nature or terms. The jury answered each of the questions so submitted to them in the affirmative, whereupon the jury was discharged, and the trial court, after receiving further evidence and hearing counsel, —the case being then fully submitted, made and filed its findings of fact and conclusions of law. By such findings the Court, in effect, adopts the verdict of the jury as to three of the questions submitted to the jury, and as to the fourth declines to adopt the verdict of the jury. As to eight of said findings of fact, the defendant has filed exceptions upon the ground that the same, respectively, are not justified by the evidence. Said exceptions embrace no specifications of particulars. But such exceptions are unnecessary in a case where the statement embraces the declaration that the defendant desires a retrial of the whole case in this Court. See *Bank* v. *Davis,* 8 N. D. 83, 76 N. W. Rep. 998. Upon such findings a judgment was entered below, from which defendant has appealed to this Court.

The record discloses that all the evidence in the case which was offered in the trial court has been incorporated in the statement of the case, and transmitted to this Court; but the further fact appears that, while the evidence was being elicited before the jury, certain evidence was offered, which upon objection thereto being made by counsel, was excluded from the consideration of the jury by the trial court. As the trial progressed before the jury such rulings were of frequent occurrence. But it is also true that it appears that after the jury was discharged the witnesses were recalled, and were then permitted to give the evidence before the Court which had been excluded from the jury. Exceptions were saved to this mode of taking the evidence, and the rulings are assigned as error in this Court; and the action of the trial court in submitting the several issues to the jury for a verdict, as already stated, is also assigned as error. These assignments of error devolve upon this Court the duty of passing upon a preliminary question of practice never before raised in this Court. The question is this: Whether section 5630 of the Revised Codes, as amended by Chapter 5 of the Laws of 1897, governs the procedure in the District Court and in this Court in an equity case, wherein the trial court calls a jury to its aid for advisory purposes. It is our opinion that said statutes do not govern in such cases. That the District Court may, at its discretion, call in a jury for an advisory verdict in an equity case, is entirely clear. This is the old and well-established practice in courts of equity, and this practice is clearly recognized in the Code of Civil Procedure. Rev. Codes, § 5420. But, when this course is adopted in the trial of equity cases, the practice which regulates such trials—the same not being governed by statutory provisions—must be sought for in elementary treatises, and in the decisions of the courts. In the

absence of controlling statutory provisions, the ordinary rules of evidence would be applicable in such cases, and would govern in the elicitation of the evidence, and upon appeal this court would not try the case anew, but would sit as a court of review for the correction of errors, as was the practice here in all cases prior to the enactment of the statute found in Chapter 82 of the Laws of 1893, popularly known as the "Newman Law." The legislative assembly has seen proper to incorporate in the statutes we have cited a new practice, both in the trial court and in this Court, in two classes of actions, namely, common-law actions wherein a trial by jury has been waived, and equity actions which are tried by the Court without a jury. The features of the new practice which are most salient are these: First, all evidence offered at the trial must be received; second, all such evidence must be preserved at the trial, and transmitted, on appeal, to this Court; third and finally, this Court sits in such cases as a trial court, in passing upon the evidence in the record. Section 5630, Rev. Codes, as amended, contains the following language: "In all actions tried by the District Court without a jury, in which an issue of fact has been joined, all the evidence offered at the trial shall be received." The terms of this statute are such as to plainly exclude from its provisions all cases, whether at law or in equity, in which a jury sits to determine the issues, or a part thereof. This statute, in its very wording, can only apply to cases which are tried "without a jury." See *First Nat. Bank of Devils Lake* v. *Merchants' Nat. Bank*, 5 N. D. 161 (opinion, 163) 64 N. W. Rep. 942. In our judgment, there are excellent reasons for a discrimination as between cases where a jury is called to pass upon some or all the issues involved, and other cases in which the judge alone, sitting as a court, determines all the issues. It is our judgment, also that all evidence offered must be received when offered. There is no authority in the statute for any other course. It cannot be overlooked that this statute compels the admission of all the evidence offered at the trial, and requires it all to be sent to this Court on appeal. This means that testimony, whether competent or not, whether relevent or not, under the established rules of evidence, must be received if offered. If the diligence of counsel has enabled him to gather only incompetent and irrelevant trash, the same must be received in evidence, if offered in evidence at the trial. It is true that the statute permits objections to testimony to be noted in the record, and this doubtless is for he purpose of directing the attention of the trial court and this Court to the character and evidential qualities of the evidence, as well as to the question of its admissibility. The statute proceeds upon the assumption that both the District Courts and Supreme Court will be presided over by judges who are learned in the law, and familiar with the rules governing the admission as well as the probative force of testimony. Going with this assumption is the further assumption that these courts, in determining cases, will be governed by well-established rules of evidence, and will not be governed or improperly in-

fluenced by mere rubbish which may, under the mandate of the statute, be received as evidence at the trial. But jurors are drawn from the nonprofessional ranks of society, and, however intelligent the average juror is or may be, no one will contend that he would be able to apply the rules of evidence to the mass of testimony which the statute in question permits to be received as evidence at the trial. We think this consideration alone is a vindication of the wisdom of that provision of the statute which excludes from its operation all cases in which juries are called to act, whether upon all or only a part of the issues to be tried. Nor does the fact that a jury in this case was called in an advisory capacity militate against the construction we have given this statute. The terms of the statute confine its operation to all cases tried in the District Court "without a jury." It is true that the verdict of a jury is not binding upon the Court in equity cases. The trial court is vested with a discretion to vacate such verdict in whole or in part, but this does not alter the fact that such verdicts are entitled to receive grave consideration at the hands of trial courts. Juries are not called, even in equity cases, as a mere formality; and their findings are seldom disregarded by courts of chancery, unless the same are clearly wrong. Experience has shown that for the trial of many questions of fact an average jury is the best of all tribunals. It is for this reason that courts of equity have always been clothed with a discretion to call a jury to their aid in determining mere questions of fact; and, in our judgment, it is quite as important in an equity case as in a law case to exclude from the consideration of juries composed of laymen all evidence save that which is admissible under the established rules of evidence.

Applying what has been said to the facts as they appear of record in this case, we shall be compelled, though with great reluctance, to hold that the procedure in the trial court in this action was wholly irregular, and was conducted upon a misconception of the law of procedure governing such a case. We are confronted by the fact that this is an equity case, in which a jury was called to determine issues of fact. In such cases, as has been shown, the ordinary rules of evidence are applicable, and this Court does not sit to try them de novo. But it also appears that the case was tried below, and has been appealed to this Court, in conformity with the provisions of section 5630, supra, which statute does not apply to cases such as this. At the trial all the evidence offered was received, and the court below bases its findings upon a consideration of all the evidence offered in the case. In settling the statement of the case, also the court below was governed by said statute. Court and counsel alike manifestly assumed at the trial, in all that was done, and in taking the appeal, that the case, as to its procedure, came within the provisions of the statute last cited. There having been a mistrial below, we deem it to be our duty to order a retrial of the case in the District Court, and a reversal of the judgment, and this Court will so direct. All the judges concurring.

(80 N. W. Rep. 760.)

WILLIAM H. BECKER *vs.* WILLIAM A. DUNCAN.

Opinion filed October 18, 1899.

Appeal and Error—Review of Denial of New Trial.

An order denying a motion for a new trial which is based upon the insufficiency of the evidence to justify the verdict will not be disturbed where it appears that there is substantial conflict in the evidence.

Appeal from District Court, Rolette County; *Morgan,* J.

Action by William H. Becker against William A. Duncan. Verdict was for defendant, and from an order denying a new trial plaintiff appeals.

Affirmed.

McDermont & Mayer, for appellant.

John Burke, for respondent.

YOUNG, J. Action to recover the value of a certain Diebold safe which was seized by the defendant, as treasurer of Rolette county, for the delinquent personal taxes of the Becker Investment Agency, and as the property of that corporation. Plaintiff alleges that he was the owner of the safe, and bases his right to recover in this action solely upon that ground. A general verdict was returned for the defendant. In addition, the jury found specially upon the question of ownership. In answer to the question, "Who was the owner of the safe in question in December, 1896, at the time of the treasurer's seizure?" they returned a finding that the Becker Investment Agency was the owner. This appeal is from an order denying a new trial. Only one ground of the motion need be considered, and that is the insufficiency of the evidence to justify the verdict. Plaintiff contends that the uncontradicted testimony shows that he was the owner of the safe when it was taken by the defendant. We think otherwise, and find in the record evidence of a substantial character supporting the verdict returned. One of the witnesses for defendant testified that the safe "was originally purchased by Mr. Becker for himself, and was afterwards transferred to the Becker Investment Agency, as a portion of the assets of the agency," and that Becker was paid for it by stock issued to him by that concern. Becker admits that the safe was included for two years in the published list of assets of this corporation, of which he was president, but explains that "it was put in there simply to make a showing," but does not appear to deny that he received stock from the company in payment for the safe. It was for the jury to determine from this testimony the vital question of ownership. The principle is well settled that a verdict of a jury will not be set aside as against the evidence when there is a substantial conflict in the evidence. We find that our conclusion on the question of ownership renders all other assignments of error which appear in the record unim-

portant. They are not, therefore, discussed. The order denying a new trial is affirmed. All concur.

(80 N. W. Rep. 762.)

JOHN HEYROCK *vs.* R. K. MCKENZIE.

Opinion filed October 18, 1899.

New Trial—Newly Discovered Evidence—Review of Ruling—Discretion of Court.

Applications for new trials, when based upon the insufficiency of the evidence to justify the verdict, or upon newly-discovered evidence, are addressed to the sound judicial discretion of the trial court; and this Court, in such cases, will not disturb the ruling of the court below, unless a case of abuse of discretion is shown.

No Abuse of Discretion Shown.

Applying this rule to the case at bar, *held*, after considering the evidence adduced at the trial and the affidavit setting out alleged newly discovered evidence, that the trial court did not abuse its discretion in refusing a new trial of this action.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by John Heyrock against R. K. McKenzie. Verdict was for plaintiff, and from an order denying a new trial defendant appeals.

Affirmed.

W. R. Garrett and *Garrett & Gordon* (*Bosard & Bosard*, of counsel), for appellant.

M. Brynjolfson (*Cochrane & Corliss*, of counsel), for respondent.

WALLIN, J. It appears by this record that a jury trial was had, and resulted in a verdict for the plaintiff; whereupon the defendant gave notice of intention to move for a new trial upon five grounds, none of which, however, are urged in this Court except the following: First, "newly-discovered evidence material to the party making application, which he could not, with reasonable diligence, have discovered and produced at the trial;" second, "insufficiency of the evidence to justify the verdict." Upon the second ground, the motion was based upon the minutes of the court; the first ground was presented upon affidavits. The motion for a new trial was denied, and defendant has appealed from the order denying the same.

The action is brought to recover an alleged balance of $129.80 due plaintiff for threshing defendant's grain in the year 1891. The only particular specified in which the evidence is claimed to be insufficient to justify the verdict is as follows, namely: "That the verdict herein is for the full amount claimed, whereas the defendant offered a receipt in payment of the account sued upon for forty ($40) dollars, admittedly executed by the plaintiff." The receipt

referred to in this specification was in evidence. Plaintiff admits that he signed the same, and delivered it to an agent of the defendant, one Pratt, upon receipt of $40, and that the amount so paid to him was on account of plaintiff's services in threshing grain for the defendant. The receipt was ignored by the jury. The controversy at the trial over this receipt turned wholly upon the date of its actual execution and delivery. Plaintiff's contention was that the receipt was given in the year 1887 for threshing done by him for defendant in that year, while defendant contended that the document was given in 1891, in which year it apparently bears date, for threshing done in the last-named year, and that the amount named in the receipt was paid to plaintiff that year, through defendant's agent, upon the account in suit. The original receipt is attached to the judgment roll, and is somewhat torn and erased, and the plaintiff claims that the receipt has been altered since he delivered it. The evidence upon this feature is voluminous, and squarely conflicting. The testimony pro and con is direct and positive, as well as indirect and circumstantial, and it is difficult to say which side has the preponderance of the evidence. But, under an established rule of practice, this Court will not ordinarily disturb a verdict upon a question of mere fact, where there is substantial evidence upon which the verdict may rest. This Court has repeatedly applied this rule. See *Taylor* v. *Jones*, 3 N. D. 235, 55 N. W. Rep. 593; *Black* v. *Walker*, 7 N. D. 414, 75 N. W. Rep. 787. See, also, *Bedow* v. *Tonkin*, 5 S. D. 432, 59 N. W. Rep. 222.

The remaining ground of the motion for a new trial is that of newly-discovered evidence. This feature of the motion for a new trial was addressed to the sound judicial discretion of the trial court, and the action of the trial court upon the motion is conclusive upon this court, unless it appears that the discretion vested in the court below has been abused. See *Barrett* v. *Railroad Co.*, 45 N. Y. 628. See, also, Hayne, New T. & App. § 87. The rule is inflexible that a new trial will not be granted upon the ground of newly-discovered evidence unless the evidence so discovered is of such a character as will probably change the result. See *Braithwaite* v. *Aiken*, 2 N. D. 57-62, 49 N. W. Rep. 419. Applications for new trials on this ground are looked upon with distrust and disfavor. Id. See *Baker* v. *Joseph*, 16 Cal. 173; *Arnold* v. *Skaggs*, 35 Cal. 684. The Supreme Court of Minnesota said: "The defeated party is usually apt to think that he could make a stronger case on another trial, and, in order that there may be an end of litigation, new trials should be very cautiously and sparingly granted on the ground of newly-discovered evidence. *Nelson* v. *Carlson*, 54 Minn. 94, 55 N. W. Rep. 821. We call attention to these well-settled principles governing applications for new trials, when made upon the ground of newly-discovered evidence, because we consider them directly in point, as applied to the case at bar.

We have attentively considered the numerous array of affidavits presented by the defendant in support of this feature of his motion,

and also the numerous and equally cogent and convincing affidavits submitted in plaintiff's behalf in opposition thereto. We think no good purpose will be subserved by commenting upon the statements advanced in the affidavits, and, without doing so, we shall simply state our conclusions upon the same with great brevity. We remark, first, however, with respect to important features of the alleged newly-discovered evidence, that the defendant has omitted to show proper diligence in bringing the same forward for use at the trial; and in the case of one document it appears that defendant knew of its existence before the trial, and yet did not prove its loss at the trial, and offer secondary evidence of its contents. In another instance defendant failed to procure the affidavits of certain witnesses whom he desired to call at a new trial, touching the testimony which they could give if sworn. Again, some of the newly-discovered evidence was strictly impeaching evidence. But we desire to say that, if these technical objections to the alleged newly-discovered evidence could be overcome, our views would remain unchanged. We are convinced that the trial court, far from abusing its discretion in the premises, exercised a proper and sound discretion in refusing to grant a new trial of this action. We think that, if all the newly-discovered evidence, so called, should be offered at a retrial of the case, a different result would be highly improbabe. Our conclusion is that the trial court did not err in refusing a new trial. The order appealed from is affirmed. All the judges concurring.

YOUNG, J., having been of counsel, took no part in the above case. *Fisk*, J., of the First District, sitting by request.

(80 N. W. Rep. 762.)

SANFORD CANFIELD *vs.* JOHN ROBERTSON.

Opinion filed October 18, 1899.

Compromise and Settlement—Evidence.

Evidence examined, and *held* that it appears to the satisfaction of this Court that a certain settlement of difference between the plaintiff and defendant, which is referred to at length in the opinion, was made, as a matter of fact.

Appeal from District Court, Pembina County; *Sauter*, J.

Action by Sanford Canfield against John Robertson. Judgment for plaintiff, and defendant appeals.

Reversed.

Templeton & Rex and *W. J. Burke*, for appellant.

Bosard & Bosard and *A. L. & T. A. Miller*, for respondent.

WALLIN, J. This is an action brought to recover back the sum of $1,100.93, with interest, which amount the plaintiff alleges that he paid to the defendant as an installment of the purchase price of certain lands in Pembina county, which lands the plaintiff claims

the defendant sold to him on or about the 22d day of March, 1892. The complaint alleges that the defendant has refused to apply said amount on the purchase price of said lands, and has also refused to transfer the title of the lands pursuant to the alleged agreement of purchase. The answer embraces a denial of the allegations of the complaint, and alleges that the defendant never contracted to sell to plaintiff the premises in question, but avers that defendant did have certain oral negotiations with plaintiff concerning a sale thereof, which negotiations were never completed, and which never ripened into a binding contract of sale. The answer further states that pending such negotiations the plaintiff entered upon the lands, and raised a crop thereon, in the year 1892, and that later in said year the plaintiff and defendant had a full settlement and accounting concerning all their business dealings with each other, including the matter of the land and the contemplated sale thereof, and that, as a part of said contract of settlement, 1,775 bushels of wheat and 250 bushels of barley (said grain being the one-half part of the crop raised in said year on said land by the plaintiff) were turned over to, and accepted by, the plaintiff, in full satisfaction of all of the plaintiff's rights, claims, and equities on account of said contemplated sale of said land or otherwise, and that as a part of said settlement the plaintiff agreed to surrender all of his rights, or supposed rights, in or to said land, and all of his claims to the crops or proceeds of the land, and all his claims and demands of every kind against the defendant, and that pursuant to such settlement the plaintiff abandoned the land, and gave it up to the defendant, who has ever since occupied and cultivated the same.

In the view which this Court has taken of the case, it is unnecessary to further notice the issues as made in the pleadings. The court below has found, and the fact is conceded by counsel, that no valid or enforceable agreement to sell the land was ever made between the plaintiff and defendant. While the parties were orally negotiating for a sale, and before the terms had all been agreed upon, the plaintiff went upon the land, doubtless believing that the contemplated sale would ripen into a written and legally binding contract of sale; and the evidence warrants the belief that such entry was made with the defendant's knowledge and consent. The plaintiff raised and harvested a crop upon the land in the year 1892, and during the process of threshing the grain, it is conceded, the parties had a settlement of some kind with each other; but counsel for plaintiff contend that such settlement did not embrace the question of the contemplated sale of the land, or of the resulting rights and equities growing out of the same, while defendant's counsel, on the contrary, contend that the settlement did embrace a general accounting between the parties, including the matter of the contemplated sale of the premises, and all rights growing out of the same. It is conceded that a division of the grain raised by plaintiff on the premises was amicably made between the parties while the grain

was being threshed, and that the plaintiff and defendant each received one-half of the crop, and that each retained such share; further, that the plaintiff, after such division, has never attempted or offered to continue the cultivation of the land. The plaintiff was a witness in his own behalf, and on cross-examination testified as follows: "After concluding the threshing, I took some of my wheat and put it in his granary, and settled things up,—I think, $45 worth of wheat,—and shook hands with him at the machine. I had nothing to do with the place after the threshing was done. Didn't care to stop. He put me off. He said he didn't want me there. I would have had a right there as soon as he signed the contract. I told him that at the time of the threshing, and before we shook hands." Another witness—one who was feeding the machine—testified that he saw Robertson and Canfield shake hands at that time, but could not hear them talking. The defendant testified in his own behalf, and stated repeatedly in his testimony that a settlement took place while the threshing was progressing, and that the same covered and included, with other minor matters not in dispute, the matter of the contemplated sale of the land. His testimony on this point was emphatic, and was reiterated with emphisis on both his direct and cross examination. Neither the plaintiff nor any other witness in plaintiff's behalf was recalled to rebut the very explicit testimony of the defendant as to the nature and scope of the settlement. It stands in this record wholly uncontradicted. All the testimony offered by plaintiff came from the plaintiff himself, and the same has been quoted in full. From this testimony we can gather no denial of the defendant's evidence which bears upon the vitally important matter of the settlement. On the contrary, the plaintiff's own evidence shows that the matter of the respective rights of the parties in the land had been discussed, or at least mentioned by the plaintiff, before the parties shook hands over the settlement which was made. The plaintiff said: "I would have had a right there as soon as he signed the contract. I told him that at the time of the threshing, and before we shook hands." Upon this testimony, we have no difficulty in reaching the conclusion that the parties to this action have voluntarily, and upon a sufficient consideration, adjusted and compromised all their differences growing out of the land deal, and the matters arising upon and incident thereto. Such settlement this Court has no right to disturb, and in this case it would seem that the parties have accomplished an adjustment of their dealings upon principles of abstract right and justice. The only question of fact found in this record which the parties desire this Court to review, or which can legally be re-examined upon the settled case, is that relating to the alleged settlement. Having decided that the settlement in fact took place, and was of the character and scope already stated, it will follow that the court below erred fundamentally in refusing to find that the settlement in fact occurred, and in entering judgment in favor of the plaintiff. The judgment of the court below will be reversed, and the trial

court directed to enter a judgment in favor of the defendant dismissing the action. The defendant will recover costs and disbursements of both courts. All the judges concurring.

YOUNG, J., having been of counsel, took no part in the above case. *Fisk*, J., of the First District, sitting by request.

(80 N. W. Rep. 764.)

JOHN E. PAULSON, *et al. vs.* THE NICHOLS & SHEPARD COMPANY.

Opinion filed October 21, 1899.

Replevin—Conclusiveness of Judgment.

A judgment in claim and delivery is conclusive upon both parties thereto as to the right of possession of the property in dispute and the value thereof, and the damages to which the successful party is entitled to the date of the verdict or decision.

Tender of Property in Satisfaction of Judgment.

The sucessful party in claim and delivery may not refuse to receive the property in dispute when tendered in satisfaction of the judgment for value, and at the same time bring an action to recover damages to said property, whether accruing before or after the date of the judgment in claim and delivery.

Appeal from District Court, Traill County; *Pollock*, J.

Action by John E. Paulson and another, as co-partners, against the Nichols & Shepard Company. From a judgment directing verdict for defendant, plaintiffs appeal.

Affirmed.

Carmody & Leslie, for appellants.

W. C. Resser and *Mills, Resser & Mills*, for respondent.

BARTHOLOMEW, C. J. This case presents some very unusual practice. Plaintiffs and appellants are here claiming a money judgment against the defendant and respondent, and allege as a basis of recovery that, in 1895, the respondent brought an action in claim and deliverey against appellants to recover possession of a certain steam engine; that in that action the engine was taken from the possession of the appellants, and delivered to respondent; that the trial of the action resulted in favor of the appellants; that appellants recovered judgment for $50 damages and certain costs, and the judgment also provided that appellants recover from respondent "that certain Buffalo Pitts sixteen horse power steam engine number 1890," or, if the same could not be delivered in as good condition as the same was at the time of the taking, appellants shoud recover from respondent the sum of $600, with interest, etc.; that subsequently the respondent here appealed that case to the Supreme Court, where it was affirmed, and in due time the remittitur was sent down. Thereafter this respondent paid the dam-

ages and costs, and tendered the engine to appellants, but appellants refused to receive the same, because it was not in as good condition as when taken from them. They then issued execution on the judgment, reciting its terms, and directing the sheriff to return the engine to appellants if the same could be returned in as good condition as when taken from them, and, if not, then to satisfy the execution from respondent's personal property. The sheriff seized the engine, but made return that he could not return it to appellants in as good condition as when taken from them, and thereupon he proceeded to sell the engine under the execution, and applied the proceeds thereon, and returned the same satisfied pro tanto. The complaint alleges that the said engine, when seized in the original action, was of the value of $600, as shown by the pleadings in that case and found by the Court; that when the return of the same was tendered, and when it was seized by the sheriff, it was of the value of $200, and no more; that respondent had damaged the same after the trial of the original action in the District Court, and before the same was tendered to appellants. Judgment is asked for the sum of $400, with interest and costs. The answer tenders no issue of fact, save as to the question of damages. There was a trial before the Court and a jury, and a directed verdict for respondent.

Upon just what theory the Court directed a verdict we are not clear, nor is it material. In our judgment, appellants were not entitled to a recovery upon any theory of the case. Their complaint did not state a cause of action, even had the proposed amendment been allowed. That amendment set forth the fact that on the trial of the original action, when these appellants reached the point where they desired to prove damages by reason of the deterioration of the engine, the counsel for the respondent stated, in open court, that no such proof need be made, because respondent had sold the engine, and could not return the same, but that if appellants obtained a judgment for value it would be paid in money, and there agreed that, if appellants obtained judgment, $50 might be allowed as damages for detention, and that, by reason of such statement so made in open court, no proof of damage to the engine was offered. It is true, also that the evidence in this case shows that the engine had been sold by respondent, but before the case was returned from the Supreme Court it had been taken back under a chattel mortgage, and thereafter a tender was made. But, however persuasive these facts might be in some other form of action, they have no relevancy here. The former judgment settled the rights of these parties respecting that engine. On the appeal to this Court (6 N. D. 400, 71 N. W. Rep. 136) no question was made on the form of the judgment. Each party was satisfied therewith, and each party must abide thereby. It is perhaps true that, under the record in that case, no alternative judgment for the return of the property was required. Shinn, Repl. § 664. And it may be true, also that if the informality in the judgment was caused by respondent's

wrong, it can take no advantage of it. Id. § 658. But these matters are not before us. Appellants proceed upon the theory that no tender of the engine has been made under the terms of the judgment. If they are wrong, then their judgment has been satisfied by the tender; if they are right, they can proceed to satisfy their judgment by execution. If they are entitled to any judgment, they already have it, upon their own showing, and are not entitled to another. They cannot refuse to accept or receive the property under the judgment, and at the same time recover for damages accruing thereto, either before or after the rendition of the original judgment. Affirmed. All concur.

(80 N. W. Rep. 765.)

FIRST NATIONAL BANK OF CORUNNA *vs.* MICHIGAN CITY BANK.

Opinion filed October 20, 1899.

Banks—Authority of Cashier to Rediscount Paper.

The cashier of a state bank organized under Chapter 23 of the Laws of 1890 has no authority to borrow money, unless it is specially given by the board of directors.

Burden of Proof to Show Authority or Ratification.

One who seeks to charge a banking corporation organized under said act upon a loan made by one of its officers must show that such officer had express authority from the directors to make the loan, or that it was ratified by them.

Discount of Forged Paper by Cashier.

The plaintiff seeks to recover the amount due upon four notes, which are admitted to be forgeries as to the makers, which notes it claims to have rediscounted for the defendant in reliance upon the latter's promise to pay plaintiff the amounts they called for, when they became due. Plaintiff dealt with defendant's cashier only. *Held*, under the facts stated in the opinion, that the transaction was a loan. *Held*, further, that inasmuch as it does not appear that the cashier was authorized to make such loan by the directors of the defendant bank, or that his acts were ratified by them, the defendant is not liable therefor.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by the First National Bank of Corunna, Mich., against the Michigan City Bank. Judgment for defendant, and plaintiff appeals.

Affirmed.

Burke Corbet, for appellant.

Cochrane & Corliss, for respondent.

YOUNG, J. The First National Bank of Corunna, Mich., sues the Michigan City Bank to recover the amount due upon certain promissory notes which it alleges it purchased from said bank in

due course of business, and for value. It is conceded that the notes were forgeries as to the makers. Plaintiff states its cause of action in three counts,—the first upon a purchase; second, upon defendant's indorsement of the notes; and, third, upon a separate written guaranty of payment. The answer of defendant denies that it sold, indorsed, or guarantied the payment of said notes. A jury was waived, and the case was tried to the Court, resulting in findings and a judgment favorable to the defendant. Plaintiff appeals, and the case is here for trial anew.

It is undisputed that all of the transactions which took place between the plaintiff and defendant upon which the alleged liability of the defendant is based were had with one H. B. Cram, who purported to be defendant's cashier, and to be acting as such in such transactions as occurred. It is not claimed by plaintiff that it did any portion of the business with any other person or officer of the defendant bank, and it does not appear that there ever was any dealing between the plaintiff and defendant other than that here in question; so that the entire alleged liability of the defendant is based upon the acts of Cram. The defendant is organized under Chapter 23 of the Laws of 1890, providing for the organization and government of state banks. Its certificate of authority, authorizing it to commence the business of banking, was issued by the secretary of state on January 23, 1893. Prior to that time the stockholders had named its directors in the articles of association. There is no record of a formal meeting of the directors for any purpose until June 6, 1893, when a president and vice president were elected, and H. B. Cram was also elected as cashier. It is admitted by the defendant, however, that it had been doing a banking business since April 6th, and that during such time Cram acted as cashier, with the knowledge and consent of the directors. Plaintiff contends that he acted as cashier with the same consent and knowledge on the part of the directors prior to April 6th, and at all times after the bank was organized to do business. Whether his assumption of authority to act as cashier during this earlier period was with the consent and knowledge of the directors is a mooted question of fact, to which counsel for both parties have devoted much attention. The view which we take of the limitations upon a cashier's authority to bind his bank to the obligations which are here sought to be enforced is necessarily decisive of the case, and renders a determination of this disputed question unnecessary. It may be assumed that Cram was at all times the cashier of defendant bank, and that he was clothed with the usual authority of cashiers. Nevertheless, in our opinion, his acts, which are here relied upon to create a liability against the defendant, are so far beyond the ordinary duties and implied authority of a cashier that they do not bind the corporation, unless it is shown that he was specially authorized by the directors to do what he did, or unless

his acts have been ratified by them. The transaction was this: Early in the winter of 1893, Cram called at plaintiff's bank to interest it in discounting some paper for the defendant bank. It seems that plaintiff's cashier then orally agreed to rediscount a reasonable amount, and that the plaintiff then and at all times relied wholly upon Cram's promise that the defendant would itself pay all of the notes it should rediscount, when they became due. After this conversation, on February 22, 1893, Cram wrote plaintiff as follows: "If we make a deal, we guaranty all paper, and will pay all paper as fast as it becomes due. You send the notes to this bank for collection, and, as fast as they become due, we will send you New York drafts for same." Plaintiff's reply seems to have been favorable, for on February 27th Cram mailed to it 14 notes, aggregating in amount $2,527, and in his letter accompanying them said: "I note what you say in regard to discounts. These notes are all due next fall, and, as I told you before, we will send N. Y. drafts for these as fast as they become due." Some time after receiving these notes, plaintiff remitted for them by sending two drafts drawn upon its New York correspondent payable to H. B. Cram, cashier. It sent $1,050 March 16th, and $1,477 on April 7th. Both drafts were received by Cram, and were deposited by him in the National German-American Bank of St. Paul, to the credit of an account which the evidence shows he carried there in the name of the Michigan City Bank, and were paid by the New York bank, and charged to plaintiff's account, in due course of business. When the notes matured, plaintiff sent them to the defendant "for payment." Upon their receipt, Cram wrote to plaintiff, using this language: "I will remit to you on the 13th of this month on the past-due discounts;" and on November 13th he sent plaintiff a New York draft for $1,889.58, covering the amount due on 9 of the notes. On January 25, 1894, Cram sent plaintiff 14 other notes, requesting it to discount them, and, after taking out the balance due on the notes formerly discounted, to remit the balance. Plaintiff selected 4 notes out of the 14, which amounted to $773.64. Out of this amount it reserved the balance due it, which was $743.60, and for the excess sent its draft on a Chicago bank, payable to H. B. Cram, cashier, in the letter returning the notes not discounted. This small draft was deposited by Cram in the Grand Forks National Bank to the credit of the defendant. These four notes so selected are the ones described in the complaint. It is conceded that they have not been paid, and that they, as well as all of the notes sent by Cram, were forgeries as to the makers. None of these notes appear to have been listed upon the books of the bank. It appears that Cram's dishonest methods were discovered some time after he drew the draft upon defendant's funds for the $1,889.58 remitted to plaintiff, and his resignation as cashier was obtained by the directors; but it was some time later before any of the officers of the bank knew of the existence of the four notes in suit, or that

plaintiff held other notes which it claimed to have discounted for defendant through Cram, as cashier.

We have stated the facts thus fully to show that this transaction was intended and understood by plaintiff to be merely a rediscount by it of certain paper which it supposed belonged to the defendant, and to be due to the latter from its customers. This, we take it, is not an unusual transaction between banks, and is one of the methods resorted to by them for lending and borrowing money. A bank whose necessities require it to raise funds for use usually secures them either by giving its own direct obligation or by rediscounting its customers' paper, with an accompanying promise to take it up when it is due, as was done in this case. Either method creates an obligation of the borrowing bank, which is represented by the note given or the note discounted. Both are methods of borrowing money. It is apparent that the plaintiff, to enforce its demands against the defendant, must show that the obligations which Cram undertook to make on behalf of the banking corporation which he represented in the capacity of cashier were either authorized by its directors, or that his acts, if unauthorized, were ratified by them, or it must appear that he had the authority to borrow money and enter into the obligations in question by virtue of his authority as cashier, and independent of any authorization or ratification. It is not claimed that any special authority was given to him, and there is an entire failure to show that his acts have been ratified; so that the liability of defendant depends upon the single question of Cram's power to bind defendant for a loan ostensibly negotiated for it arising out of his general authority as cashier. Both reason and judicial interpretation lead us to deny that he had such authority. Chapter 23 of the Laws of 1890, under which the defendant is organized, is copied from the national banking act. That portion of the act relating to the powers of banks is found in subdivision 7 of section 4 of said chapter, and is the same as Rev. St. U. S. § 5136, par. 7, and reads as follows: "To exercise by its board of directors, or duly authorized officers or agents, subject to law, all such incidental powers as shall be necessary to carry on the business of banking, by discounting and negotiating promissory notes, bills of exchange, drafts and other evidences of debt, by receiving deposits, by buying and selling exchange, coin and bullion, by loaning money on personal security." To this the parent statute has added the power of obtaining, issuing, and circulating notes. The question of the borrowing power of a banking corporation under this section, and the lawful manner of its exercise, was squarely before the Supreme Court of the United States in the case of *Bank* v. *Armstrong*, 152 U. S. 346, 14 Sup. Ct. Rep. 572, decided in 1893; and it was then held that the borrowing of money was so much out of the course of legitimate banking that those making a loan to a bank must see to it that the officer assuming to act had special authority to act. After quoting Rev. St. U. S. § 5136, par. 7, the Court said: "The power to borrow money or to give notes

is not expressly given by the act. The business of the bank is to lend, not to borrow, money; to discount the notes of others, not to get its own notes discounted. Still, as was said by the Court, in the case of *First Nat. Bank* v. *National Exch. Bank*, 92 U. S. 127, 'authority is given in the act to transact such a banking business as is specified, and all necessary powers to carry it on are granted. These powers are such as are required to meet all the legitimate demands of the business, and to enable a bank to conduct its affairs, within the scope of its charter, safely and prudently. This necessarily implies the right of a bank to incur liabilities in the regular course of its business, as well as to become the creditor of others.' Nor do we doubt that a bank, in certain circumstances, may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see that the officer or agent acting for the bank had special authority to borrow money." It is true that the official whose action was in question in this case was the vice president, but there was evidence which went to show that he was the principal executive officer of the bank; and the Court, in its opinion, assumed that he was, but said that "it is yet obvious that the vice president, however general his powers, could not exercise such a power unless especially authorized so to do, and it is equally obvious that persons dealing with a bank are presumed to know the extent of the general powers of the officers." Later the Circuit Court of Appeals, Sixth Circuit, in *Bank* v. *Armstrong*, 13 C. C. A. 47, 65 Fed. Rep. 573, in following this case, refers to it as holding that "the borrowing of money by a bank, though not illegal, is so much out of the course of ordinary and legitimate banking business as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money, and that where no such special authority appears, and no ratification of the unauthorized act is shown, the bank is not liable." Further on in its opinion, that Court, after citing copiously from state courts, said: "The effect of the foregoing cases is that it is within the usual course of banking business for a bank to borrow money, and that the generally recognized authority of the cashier or managing officer of the bank extends to making such loans, and that therefore any one dealing with such officer has the right to rely on the existence of such authority unless the contrary appears;" and then adds: "The effect of the decision in *Bank* v. *Armstrong* is to make the above rule as to the authority of a cashier to borrow money for the bank inapplicable to national banks." In view of the close relationship of our statute under which defendant exists with the national banking act from which it is admitted the act of 1890 is copied, these decisions are, we think, decisive as to the authority of a cashier of a state bank organized under this law to borrow money; and we have no hesitation in adopting their interpretation, which appeals to us as both sound and salutary.

The District Court gave plaintiff judgment for $30.04, with 7 per cent. interest from January 29, 1894, for the small draft which was sent by it on that date, and deposited to defendant's credit in the Grand Forks National Bank. This we do not disturb. The judgment of the District Court is affirmed. All concur.
(80 N. W. Rep. 766.)

ROLETTE COUNTY *vs.* PIERCE COUNTY.

Opinion filed October 28, 1899.

Appeal From Paid Judgment.

A party who voluntarily pays a judgment against him cannot appeal therefrom.

Payment of Amount for which Judgment is Ordered Bars Appeal from Judgment.

A party who voluntarily pays the amount specified in an order for a judgment against him cannot, in case formal judgment is thereafter entered upon such order, appeal from such judgment on the ground that the order was improperly granted.

Appeal from District Court, Benson County; *Fisk*, J.
Action by Rolette County against Pierce County. Judgment sustaining demurrer to complaint, and plaintiff appeals.
Affirmed.

Burke Corbet and *John Burke*, for appellant.

L. N. Torson and *Steenerson & Rowe*, for respondent.

BARTHOLOMEW, C. J. In 1887 the legislature of the Territory of Dakota created the County of Pierce. See Chapter 180, Laws 1887. In its formation certain townships were segregated from the County of Rolette and incorporated in the County of Pierce. At that time Rolette county was indebted in a certain sum. In June, 1889, Rolette county, the plaintiff and appellant herein, brought an action against Pierce county, defendant and respondent herein, to recover what was alleged to be the proper proportional share of the indebtedness of Rolette county. On July 13, 1889, the defendant served a general demurrer to the complaint. The action had been brought in Rolette county. Pursuant to a proper application, the Court, on July 31, 1889, made an order changing the place of trial to Benson county, and awarding to the defendant motion costs therefor. On August 9, 1889, after full argument, an order was made sustaining the demurrer and dismissing the complaint. On the same day an order for judgment was signed, which reads: "This action having come on to be heard upon the issue of law joined herein, and the court having sustained the demurrer to the plaintiff's complaint and ordered the complaint dismissed, it is now here adjudged that the plaintiff's complaint be, and the same is hereby, dismissed, and that

the defendant do have and recover of and from the plaintiff ten ($10) dollars costs, taxed herein at that sum. Done by the court in vacation, at St. John, Rolette county, D. T., on this 9th day of August, 1889." All these orders were filed in Rolette county. Certified copies of all the papers in the case were sent to, and received by, the clerk of the court of Benson county, but they were never marked filed in that county. On January 18, 1890, Rolette county drew its warrant in favor of the attorney for the defendant for the full amount of the costs in the case. On September 16, 1898, more than nine years after the demurrer had been sustained and the order for judgment signed, an application was made by plaintiff to the proper court for an order on defendant to show cause why said order for judgment should not be set aside, and plaintiff given leave to amend. An order to show cause issued, and upon its return it was exhaustively presented upon voluminous affidavits and record entries. As a result of such hearing, the motion to set aside the order for judgment and for leave to amend was denied, and the clerk of the court for Benson county was directed to enter a formal judgment on the order for judgment signed August 9, 1889, and on February 14, 1899, such judgment was entered, from which judgment plaintiff appeals.

At the threshold of this case, respondent presents the proposition that appellant long since abandoned the case and lost its right to appeal. We think this position must be maintained. Ordinarily claims of this character would become barred in six years. In this case for more than ten years appellant took no steps looking to the enforcement of the claim, and gave no indication that it supposed that it had any claim. Of course, under the circumstances, the bar of the statute did not fall; but considering the unusual laches, for which no reasonable excuse is offered or suggested, it would be improper, even in a law case, to resolve any doubtful matter in appellant's favor. All the members of this court know that, under the late territorial practice, it was a very common matter to draw a paper in form a judgment such as the court desired, and have it signed by the judge. This paper was treated as the judgment and its subsequent entry by the clerk in the judgment book was regarded as a perfunctory matter. This practice, as this Court has repeatedly held, was a misconception of the statute. *In re Weber*, 4 N. D. 119, 59 N. W. Rep. 523; *Field* v. *Elevator Co.*, 5 N. D. 400, 67 N. W. Rep. 147. But the practice prevailed with many practitioners of good stating, and it is perfectly clear that such was the practice in this case.

What is called in this record an order for judgment, and which is hereinbefore copied, is in all respects a judgment in form. It says: "It is now here adjudged that the plaintiff's complaint be, and the same is hereby, dismissed, and that the defendant do have and recover," etc. That language in a judgment book would constitute a judgment. It was treated as a judgment. Both parties knew that it was signed. The costs were agreed upon and inserted therein.

Subsequently it was paid, and we think that it never occurred to any one to treat it other than as a judgment until after the decisions above cited were rendered, and it developed that no judgment had ever been entered in the judgment book for Benson county. One who voluntarily pays a judgment cannot appeal therefrom. *Borgalthous* v. *Insurance Co.*, 36 Iowa, 250. A voluntary payment by an appellant pending an appeal is ground for dismissal of the appeal. *Hipp* v. *Crenshaw*, 64 Iowa, 404, 20 N. W. Rep. 492. But let us suppose that appellant treated it simply as an order for judgment; it is entirely competent for a party against whom such an order has been made, for the purpose of avoiding further costs, to voluntarily pay the specified amount, and thus remove all necessity for a judgment. Should formal judgment be entered nine years thereafter, could he be heard to appeal therefrom on the ground that the order was improperly entered? There is no authority known to us that would support such a course. We can find no warrant for disturbing the judgment in this case, and it is affirmed. All concur.

(80 N. W. Rep. 804.)

WILLIAM H. BECKER *vs.* JOHN CAIN.

Opinion filed October 21, 1899.

Witness—Impeachment—Trial.

It is error to permit the cross-examination of a witness, over objection, for the purpose of impeachment, upon matters irrelevant to the issue; and the answer of a witness as to such irrelevant matters is binding upon the party eliciting it, and cannot be contradicted. To permit the introduction of evidence in contradiction, over objection, is error.

Argument of Counsel Presumed to be Based upon the Evidence.

It will be presumed, in the absence of a contrary showing, that statements made by an attorney in his arguments to a jury are based upon the evidence in the case, and that they are not his individual statements of facts. Accordingly, *held*, under the facts stated in the opinion, that it was error to permit plaintiff to be cross-examined for the purpose of impeachment, against objection, as to a certain statement made by him in an argument of a case wherein he was attorney.

Contradiction of Witness upon Collateral Matters Elicited upon Cross Examination.

Also, *held*, that it was error to admit evidence, over objection, to contradict his answer, and that such errors were prejudicial.

Appeal from District Court, Rolette County; *Morgan*, J.

Action by William H. Becker against John Cain. Judgment for defendant, and plaintiff appeals.

Reversed.

McDermont & Mayer, for appellant.

John Burke, for respondent.

YOUNG, J. The plaintiff sues to recover the value of a quantity of wheat which he alleges was seized and converted by the defendant on November 21, 1895. The complaint alleges that the plaintiff was the owner of and in possession of the wheat in question at the time it was taken by the defendant, and that said wheat was then in a car standing on the side track of the Great Northern Railway in Rolla, in this state, and was in amount 1,050 bushels, and of the value of $550. The answer admits the seizure of the car of wheat, but by denials places in issue plaintiff's ownership and his possession of the same, and by way of justification for his acts defendant alleges that he took possession of said wheat as sheriff of Rolette county, and in an action in claim and delivery, in which Reandean Bros. were plaintiffs and the Alliance Mortgage & Investment Company was defendant. It is thus apparent that defendant's answer not only challenged plaintiff's right to recover anything by denying his ownership, but that it also attempted to lay a foundation for a justification of his acts in any event, and an exemption from liability, by showing that he took the grain in the performance of his duties as sheriff, and in obedience to the commands of the papers in his hands, and from the possession of the defendant in that action. The case was tried to a jury, and a verdict unfavorable to plaintiff was returned. Plaintiff made a motion for a new trial, and this was overruled. His appeal is from the order overruling this motion.

The settled statement upon which the motion for a new trial was made specifies certain particulars in which it is claimed the evidence is insufficient to justify the verdict, and also contains numerous specifications of alleged errors of law occurring at the trial; all of which are urged by counsel in his assignments of errors as grounds for a reversal of the order refusing to grant a new trial. But, inasmuch as we have found it necessary to order a new trial because of prejudicial errors which occurred in the admission of certain evidence which we shall discuss, no other assignments will be considered, as it does not seem probable that the same questions will arise upon the new trial. It appears that at the time when the alleged conversion occurred the plaintiff was engaged in dual occupations; one of which was the buying and shipping of grain, the other the practice of his profession as an attorney at law. It is shown that he acted as attorney for defendant in the claim and delivery action in which the wheat in question was taken; that in behalf of the defendant in that action he served a notice requiring plaintiff's sureties upon the claim and delivery bond to justify; further, that he was present at the trial as counsel for the defendant, and argued the case to the jury. The error which we will consider, and which renders a reversal necessary, consists in the injection into the evidence in this case, over plaintiff's objection, of a certain isolated statement of plaintiff, Becker, made in his argument to the jury in the trial of that case. After he had testified as to his ownership of the grain, and generally in support of the allegations of his complaint, he was asked, upon cross-examination, if, in his argument

to the jury in the claim and delivery action, he had not stated to them that this wheat belonged "to the poor farmers of Rolette county." The plaintiff's objection that the question was irrelevant, and not proper cross-examination, was overruled, and the witness answered that he did not so state, but that what he said was that the wheat had not all been paid for, and that the money for the wheat belonged to the farmers. Later the defense called two witnesses for impeachment purposes, both of whom, after stating they had heard Becker's argument to the jury, were asked this question: "Did he state to the jury that the wheat taken in that case belonged to the farmers of Rolette county? Both answered "Yes." The questions were objected to as incompetent, irrelevant and immaterial, and the objections overruled. These rulings are urged as erroneous, and we think they were, and that the admission of the evidence was highly prejudicial; for it is patent, from our examination of the record, that the emphasis given to the statement as to the ownership of the grain which he made in his argument in the claim and delivery action had great, and perhaps controlling, weight in discrediting his claim of ownership here. It is evident that counsel for the defendant, in cross-examining Becker, was endeavoring to impeach his credit by proof that he made a statement elsewhere as to the ownership of the wheat in question different from that to which he had just testified; and this is not an unusual method of impeachment. But the preliminary requisite for this kind of impeachment is that the cross-examination shall be as to matters relevant to the issue; otherwise, the answer of the witness cannot be contradicted. *State* v. *Haynes*, 7 N. D. 70. See 1 Greenl. Ev. § 462. Elsewhere in the same volume, in section 449, that author states that: "It is a well-settled rule that a witness cannot be cross-examined as to any fact which is collateral and irrelevant to the issue, merely for the purpose of contradicting him by other evidence, if he should deny it, thereby to discredit his testimony. And, if a question is put to a witness which is collateral or irrelevant to the issue, his answer cannot be contradicted by the party who asked the question, but it is conclusive against him. But it is not irrelevant to inquire of the witness whether he has not on some former occasion given a different account of the matter of fact to which he has already testified, in order to lay a foundation for impeaching his testimony by contradicting him." The foundation of the error in admitting in evidence proof of the statements made by Becker in his argument to the jury lies in the unwarranted assumption that excerpts from the language of an attorney in advocating his client's cause before a jury, and within the limits of his duties, can be used to impeach and discredit his testimony in case he should subsequently testify to facts different from those stated in his argument. The nature of the duty which an attorney owes to his client and to his cause, as well as the restriction which rests upon him to confine his discussion to the facts in evidence and the inferrences to be drawn therefrom, will not permit us to characterize his statements made

in the course of legitimate argument as his individual statement of facts deliberately made and from his own knowledge. On the contrary, they are not his individual statements of fact, and are not so made, or so understood. For the time his individual identity is lost, and he stands as the representative of his client before the jury, as his mouthpiece in presenting to them the facts which he believes the evidence of the witnesses have established. What the evidence before the jury was we are not informed. Whether it showed or tended to show that the wheat was in whole or in part, owned by the farmers, we do not know; but, in the absence of a contrary showing, we must assume that such statements as were made by Mr. Becker in his argument were within the line of his duty as an attorney, and legitimate comments upon the evidence in the case. His statement as to the ownership of the grain, made under such circumstances, whatever it may have been, was clearly irrelevant to the issue in this case, and was accordingly improper for the purpose of impeachment; and his answer as to what he did say, being upon an irrelevant matter, was not subject to contradiction. For the reasons stated, the order overruling the motion for a new trial is reversed, and a new trial is ordered. All concur.

(80 N. W. Rep. 805.)

ESTHER M. CAMERON *vs.* GREAT NORTHERN RAILWAY COMPANY.

Opinion filed October 31, 1899.

Injury to Railroad Employe—Evidence.

Evidence examined and *held* that the trial court properly directed a verdict for the defendant.

Appeal from District Court, Grand Forks County; *Lauder*, J.

Action by Esther M. Cameron against the Great Northern Railway Company. Judgment for defendant and plaintiff appeals.

Affirmed.

Bosard & Bosard, for appellant.

The question of defendant's negligence was for the jury. *Cameron* v. *Great Northern Ry. Co.*, 8 N. D. 124; 12 Am. & Eng. R. R. Cas. 520; *Northern Pacific Ry. Co.* v. *Herbert*, 116 U. S. 642; *Brann* v. *Railway Co.*, 36 Am. Rep. 243; *Cincinnati, etc., Ry. Co.* v. *McMullen*, 117 Ind. 439. It will be presumed that deceased was in the exercise of due care at the time of the accident, there being no eye witness to the accident and no evidence to the contrary. *Cameron* v. *Railway Co.*, 8 N. D. 124. It will not be presumed that the servant assumed the risk of operating the defective car, or was guilty of contributory negligence in the absence of proof that he had knowledge of the dangers of the service. *Chicago, etc., Ry. Co.* v. *Hines*, 23 N. E. Rep. 121. The fact that a servant knows the defective condition of the instrumentalities with which he works,

does not necessarily charge him with contributory negligence, unless he understands the risk to which these defects expose him. *Woutila* v. *Duluth Lumber Co.*, 33 N. W. Rep. 551; *Clark* v. *Railway Co.*, 9 N. W. Rep. 581; *Russell* v. *Railway Co.*, 20 N. W. Rep. 147; *Cook* v. *Railway Co.*, 24 N. W. Rep. 311. If a prudent person would not have believed the defects dangerous, he may disregard them without losing his right to complain if he suffers from the defect while pursuing his ordinary course. *Colorado, etc., Ry. Co.* v. *Ogden*, 3 Colo. 499; *Burlington, etc., Ry. Co.* v. *Liehe*, 17 Colo. 280; *Scanlan* v. *Railway Co.*, 18 N. E. Rep. 209; *Ferren* v. *Railway Co.*, 9 N. E. Rep. 609; *Williams* v. *Churchill*, 137 Mass. 243; *Thorpe* v. *Railway Co.*, 2 S. W. Rep. 3; *Patterson* v. *Railway Co.*, 76 Pa. St. 388; *Snow v. Railway Co.*, 8 Allen, 450. The question of deceased's negligence should have been submitted to the jury. *Mahoney* v. *Dore*, 30 N. E. Rep. 366; *Fitzgerald* v. *Company*, 29 N. E. Rep. 464; *Pomeroy* v. *Inhabitants*, 28 N. E. Rep. 899; *Phelon* v. *Inhabitants*, 28 N. E. Rep. 899; *Ferren* v. *Railway Co.*, 143 Mass. 73; *Dewise* v. *Bailey*, 131 Mass. 169; *Donahoe* v. *Railway Co.*, 83 Mo. 560; *Pitts* v. *Railway Co.*, 27 S. E. Rep. 189; *Railway Co.* v. *Michaels*, 46 Pac. Rep. 938.

W. E. Dodge, for respondent.

The removal of the steps from the rear platform of the sleeper "Benton" was not the cause of Conductor Cameron's death; but the evidence in this record conclusively establishes the fact that his death was caused by falling, or being thrown, from the rear end of the platform while engaged in adjusting the air valves under the center thereof. No jury could predicate a finding upon the evidence to support the plaintiff's contention as to the cause of Cameron's death. *Philadelphia, etc., Ry. Co.* v. *Schertle*, 2 Am. & Eng. R. R. Cas. 158; *Peter Orth* v. *Railway Co.*, 47 Minn. 384; Bailey's Masters' Liability, 503 & 508; *Koslowski* v. *Thayer*, 63 Minn. 150; *Moore* v. *Railway Co.*, 67 Minn. 396. Conductor Cameron received and accepted this train at Minot, North Dakota, the initial point in his journey, with notice and knowledge of the fact that the steps in question had been removed. He undertook to take the car, in its defective condition, to the end of his run. He undertook thereby to represent the company in the transfer and delivery of this car and to make the same safe for the traveling public and subordinate employes. He assumed all the hazards and risks incident to its transfer and delivery in the condition in which it was, and was known by him to be, and his representatives cannot recover even if he so far forgot his contract, his duty, and the known danger, that he unlocked the door and unfastened the gate and walked off into space and met his death. *Puffer* v. *Railway Co.*, 68 N. W. Rep. 39; *Clark* v. *Railway Co.*, 28 Minn. 128; *Kelly* v. *Railway Co.*, 35 Ill. 106; Patterson's Accident Law, 344; Wood's Master and Servant, 680-718; *Gibson* v. *Railway Co.*, 63 N. Y. 449;

Haden v. *Manufacturing Co.*, 29 Conn. 548; *Devitt* v. *Railway Co.*, 50 Mo. 302; *Baylor* v. *Railway Co.*, 40 N. J. L. 23. It may fairly be presumed that a servant knows the condition of machinery and appliances which his contract of employment requires him to inspect, which he has constant opportunity to inspect, and which his regular duties bring under his notice. 1 Sherm. & Redf. on Neg. 216; *Railroad Co.* v. *Marker*, 41 Ark. 543; *Sheets* v. *Sheldon*, 103 N. Y. 667; *Brossman* v. *Railway Co.*, 113 Pa. St. 490; *Houston, etc., Ry. Co.* v. *McNamara*, 59 Tex. 255.

WALLIN, J. This action was tried to a jury and the trial court after the evidence on both sides was submitted, directed a verdict in favor of the defendant. This ruling is the only error assigned in this Court. The case is now before this Court for a second time. In the first appeal there was a similar order,—directing a nonsuit,—which order, however, was based wholly upon the plaintiff's testimony; no evidence being offered in that trial for the defense. *Cameron* v. *Railway Co.*, 8 N. D. 124, 77 N. W. Rep. 1016. It appears further that the case has been tried three times. The first trial resulted in a verdict for the plaintiff, which verdict was set aside, and a new trial granted, by the trial court. At the last trial, by stipulation of counsel, the evidence, or a large part thereof, as taken down at the first trial by the stenographer, was read to the jury, and hence the defendant's evidence is now, and for the first time, before this Court for consideration. It therefore becomes necessary, to a proper understanding of the case, not only to refer to the facts as stated in the opinion of this Court as reported in the case cited, but to make a new and supplementary presentation of the facts as they are found in this record. For an outline of the facts we refer to the opinion already cited, but for a fuller presentation of the case we will make a resume of the evidence as it now stands in the record.

This action is for the recovery of damages for the alleged negligence of the defendant, which, as is claimed, caused the death of Edward J. Cameron, who was the husband of the plaintiff. The precise grounds of the alleged negligence are, in effect, that the defendant furnished the deceased with a train of cars—to be run and operated under the supervision of the deceased as conductor—which was unsafe, imperfect, and inadequate, in this: That the steps on the left-hand side of the rear end of the sleeping car at the rear end of the train were broken, and had been removed prior to the delivery of said train to the deceased at Minot on the day he was killed; and that said broken and unsafe condition of the train was known, or could have been known, to the defendant, by the exercise of ordinary care and diligence; but that the said condition of the train was unknown to the deceased. It is further alleged that while the deceased was in the discharge of his duty as conductor of the train, and by reason of defendant's alleged negligence, the deceased, while said train was moving at great speed, was cast upon the ground, and killed. The complaint further avers that "there was

a gate upon the platform of said car where said steps aforesaid had been removed that could have been easily and conveniently closed and fastened, whereby the said car could have been easily and conveniently rendered safe, which fact was well known to the defendant, but the defendant neglected to cause said gate to be closed and fastened." It will be noticed that the alleged negligence does not embrace a statement that the train in question, or the sleeping car in question, or any of the machinery or equipment of the train or said sleeper, were defective, unsafe, or inadequate, except only that the steps on the rear end of the rear sleeper, on the left side, were broken and removed. These averments in the complaint narrow the questions of fact to be determined here to an inquiry—First, whether the train in question, when the same was delivered to deceased, contained a rear sleeper with steps broken and removed, as alleged; and, if this is answered in the affirmative, whether the defendant then knew that the steps were broken and removed; and, third, whether the deceased was informed of this condition of the steps by the defendant when he was given charge of the train, and hence knew of its unsafe condition; and, finally, whether the deceased was killed by falling from the train through the opening caused by the removal of the steps, or in some other manner. The additional evidence now before this Court enables us to do what was impossible on the former appeal, namely, to answer all the questions of fact which we have above propounded except that which has reference to the exact manner in which the deceased lost his life; and, in the view we have taken of the case and of the evidence before us, we shall be able to make a final disposition of the case without decisively passing upon the question of fact which involves the place and manner in which the deceased was killed. In our opinion, the controlling facts of the case are established conclusively by the undisputed testimony in the record. Such facts, in our judgment, are fairly stated in the brief filed in this Court by the respondent's counsel, and we shall therefore utilize a portion of the facts so stated, as follows: "The decedent was, at the time of his death, a passenger-train conductor in defendant's employ, and had been so engaged for several years. On the 17th day of November, 1894, he was killed by falling or being thrown from a passenger train of the defendant, then in his charge as conductor. The accident occurred in the County of Grand Forks, North Dakota, about midway between the station of Arvilla and the next station, situated about seven miles east of Arvilla, named 'Emerado.' The accident occurred between 6:43 and 6:52 p. m., and at a time when the train was running at a high rate of speed. The train was east-bound, and was the regular Pacific coast passenger train, consisting of nine cars, and running between Seattle, Washington, and St. Paul, Minnesota, via the Montana Central Railroad between Butte and Havre, Montana. One of the stations on the Montana Central through which the train passed was Great Falls. The train reached Grand Forks, North Dakota, at 7:25 p. m., where the conductor was first

missed, and, on being searched for, his body was found at the place before indicated. It was nothing unusual for steps to be broken and removed from the platform of cars in transit, and such cars were received by the conductors of the company at Havre, Montana, and taken east, as often as once a month. Such cars having broken steps were never taken out of the trains in transit for repair, there being no intermediate repair shops for such repairs between the Pacific coast and St. Paul; but were in every instance retained and continued in the train by the conductors in charge, and taken to the shops at St. Paul for repair. It is the undisputed testimony of the conductors, brakemen, and porters that they never knew of one single instance, where the steps were broken off a car or cars in transit, of such car or cars being taken out of a train, or left at an intermediate point for repair. On the 16th day of November, 1894, when the train in question reached Great Falls, on the Montana Central road, there was standing on the depot platform a large baggage truck, loaded with baggage; and just as the train to which the sleeper Benton was attached was backing into the depot the wind set this truck in motion, and in going off the platform it struck and broke the steps on the left-hand side of the above-named sleeper, and the broken steps were removed, and the fastening bolts thereof laid on the rear platform of the sleeper, and the car came east without the steps being replaced. This train was received by Conductor Lyon at Havre, Montana, a junction between the Montana Central and Great Northern, and was in good condition, except that these steps on the north side of the rear platform of the rear sleeper Benton had been removed as aforesaid. Conductor Lyon and his brakeman fastened the iron gate on the north side of the rear platform of the sleeper Benton at Havre, although it was not fastened when he received the train. The rules of the company relative to the conduct, duties, and responsibilities of passenger conductors—Nos. 259, 266-268, 300, 301, and 306—are marked 'Exhibit D,' " and were put in evidence, and, we think, properly. "Rule 306 is as follows: 'They [passenger conductors] must examine and know for themselves that the brake shafts and attachments, ladders, running boards, steps, handholds, and other parts and mechanical appliances which they are to use are in proper condition before using. If not, report them to the proper parties, that they may be put in proper condition before using.' These rules have all been in force by the company, and have regulated the conduct of its conductors, since 1890. They were in force at the time of the accident, and formed a part of the code of rules prepared and published by the company on the first of that year in its book of rules, which was delivered to each passenger conductor in the employ of the company on the first day of that year. Passenger-car conductors were compelled to have one of these books before they were allowed to enter upon their duties, and Conductor Cameron, the decedent, then had one. The rear platform of the sleeper Benton was about five feet wide across the car and about three feet the other way. It was guarded at the

rear by an iron rail supported by iron stanchions, and across the center by a chain guard. In the center of the platform between the stanchions there was placed," on the evening in question, "a large bull's-eye lantern or signal light, which was tied with a rope to the guard chain or stanchion. Iron gates about three and one-half feet high, when closed, shut in this platform on the sides, and prevented ingress and egress to the platform by way of the steps leading thereto. These gates swung from the car to the railing out to close and in to open. An iron hinge, with a joint in the center, constituted the fastenings for these gates ordinarily. These hinges were fitted with a joint on the gate, another on the car, and one in the center, half way between. As the gate closed, the hinge straightened out, so that the gate could not be opened without forcibly lifting or raising the hinge in the center by applying the hands to the hinge. These gates, when closed, are inside the steps, so that a person on the platform could not pass down the steps without first opening the gates by raising the hinge. At Minot, North Dakota, Condutcor Lyon turned over the train to the decedent, Cameron, at 11:15 a. m. In turning over a train by one conductor to another, it was customary for the conductor turning over the train to tell the one receiving it of any defect in the train or in the appliances, so that he might note it in his conductor's record book. In turning over the train in question at Minot, Conductor Lyon notified the decedent of the condition of the steps. Mr. Lyon testified: 'In turning over that train, I told Conductor Cameron that the steps were broken at the rear end of the sleeper Benton,—the Butte sleeper,—on the north side. At the time I told him, he was walking up toward the sleeper on the platform. I went with him to the end of the car,—the end of the sleeper Benton, the rear end, on the right hand side. He stepped down on the track, and looked at it, and said, "he guessed it would be all right." "He went round, probably pretty near the track,—a little way over half way across the track behind the train. He just looked around at the steps; looked at the gate, and came back. The gate was closed at the time. I can't say whether there was a rope on it at that time or not, but it was closed, and I don't remember about noticing about the rope at that time. He and I were alone. We had no other conversation about the train more than usual.' Rule 268 provides that when receiving a train at a terminal station 'conductors must make a memoranda of all cars composing their trains, examine the brakes, couplings, and safety chains, signal cords, etc., so as to know, as far as practicable, if everything is in order, before starting,' etc. The rear brakeman under the decedent when he received and accepted the train in question at Minot was Francis B. Skinner. He also made a report to the decedent of the condition of the steps. His evidence need not be detailed, as it is the same in substance as that of the conductor Lyon. O. D. Claybourn, the porter on the car Benton, testifies: 'I had a conversation with Mr. Cameron that day about the rear platform and the steps, after we left Minot, between Burwick and

Devils Lake. He came back to get the tickets. He asked me how the accident occurred, and I told him. He told me about the back door; to keep it locked, and to watch it. This was at the same place at the same time I told him how the accident occurred. Special cars go over the road once, and sometimes twice, a month, on these trains. They have the same protection to the platform as the sleeper in question; so that when you open the gates, similar to those on the sleeper Benton, with the train moving, there are no steps. The platforms on those cars are exactly the same as the platforms of similar cars without steps." In other words, the testimony shows that it was not unusual for passenger cars to be conveyed in passenger trains over this line with the steps removed from one or more platforms; that private and business cars were constantly conveyed with platform similar to that on the rear end of the sleeper Benton, protected in the same manner, and equally as dangerous to train operatives, since, when the gates to the sides of the platform were opened by the lifting of the hinges, any operative might walk off into space; that it was the duty of a conductor turning over a train at a terminal point to another conductor to notify him of the condition of the train, and this duty arose out of custom and the rules of the company; that it was likewise the duty of the conductor receiving such train not only to heed such instructions, but to personally inspect and know the condition of the steps, and at terminal points, and whenever opportunity offered, to inspect and know the condition of such appliances; that Conductor Lyons, in obedience to custom and rules, did, upon turning over the train to Conductor Cameron, notify him that these steps had been removed; that Conductor Cameron accepted the train with such knowledge, and said he thought it would be all right if the rear door was kept locked and the gate closed; that his brakeman—Skinner—noted the absence of the steps, and reported the same to him on the depot platform at Minot; that Cameron appeared as one who had been informed of the fact before; that he never suggested to him the propriety of tying the gate, or fastening it in any way other than by the hinge; simply said, 'We will keep the gate closed, and the door locked with the coach key, so that passengers cannot get out on the rear platform;" that the decedent afterwards talked with the porter, Claybourn, who gave him the details of the accident, whereupon the conductor said that he should keep the door locked, and watch it; that the decedent knew that the custom and rules of the company required him to know that the steps had been removed from the north side of the rear platform of this car, and that he, as conductor, if he deemed it unsafe, ought to report it to the proper representatives of the company for repairs, or make it safe, as it was easy to do by tying, chaining, or locking, if he did not deem the hinge sufficient.

Despite the contention of the appellant's counsel to the contrary, we shall hold that there is no substantial conflict in the evidence which establishes the facts as thus far narrated. Counsel for the

respondent claims and contends that the evidence also establishes the following facts conclusively: First, that the train was equipped with air brakes, which were governed by the engineer by means of an air pipe running under the cars; second, that on the afternoon in question the air brakes were not acting properly, and were sticking, and that the train had been delayed thereby at Larimore and at another point west of the place of the accident; third, that the deceased, shortly before the accident, had been searching through the train for the cause of this sticking of the brakes; fourth, that the conductor, after the train passed Arvilla, passed out of the rear door of the sleeper and onto the platform for the express and avowed purpose of looking after the cause of the difficulty with the brakes; fifth, that a valve or appliance attached to the air brake was located under each car, and a few inches to the right of the center, and that it was sometimes proper and necessary, in looking for leaks in the air brake, to examine such appliance, and that this could be done by getting down and reaching over the end of a rear car, and that conductors and train men were in the habit of doing this in prosecuting a search for the cause of a leak in the air pipe; sixth, that the gate in question was not only closed, but that the same was securely tied with a rope by the car porter soon after the train started from Minot, and that it continued so tied, and was tied when the train passed the place of the accident and when it reached Grand Forks. Upon these assumptions of fact counsel strenuously argues that the evidence points conclusively to the fact that the deceased lost his life while engaged in leaning over the rear end of the platform in search for the cause of the leak in the air pipes, and consequently that he was not killed by passing out through the gate in question, as claimed by the plaintiff.

We have carefully considered the evidence bearing upon the several propositions of fact last enumerated, and we are inclined to the view that all of them are established by a preponderance of the evidence; but we are unable to accept the view of counsel that there is no evidence whatever which tends to dispute these facts. This is especially true as to the important question of whether the gate was or was not tied with a rope at the point where the accident occurred. There being some conflict in the evidence upon this matter of fact, it would have been the proper course to submit such questions to a jury for determination, were it not for other facts which control the case, and which were conclusively established by undisputed testimony. We are entirly convinced that the facts in the record completely refute the plaintiff's charge that the deceased came to his death through the negligence or wrongful acts of the defendant, and our opinion would not be different if the evidence showed beyond dispute—as it does not—that the deceased passed out of the gate in question to his death. It appears that the deceased not only was the conductor of the train, and as such in charge of it, and of the subordinate trainmen upon it, but it further appears

that his authority was plenary and absolute with respect to accepting the train as safe and adequate. No other person shared this responsibility with the deceased. His authority and duty required him to make a careful inspection of the train delivered into his keeping with reference particularly to the question of its adequacy and safeness as a train for the transportation of passengers and employes who were to take passage upon it. He had full power, under the rules and instructions of the defendant, to inspect the train, and to reject any car which, in his judgment, was unsafe; and, if the car in question was unsafe, it was his imperative duty to exercise such power and authority by promptly rejecting the car or by making it safe. The defendant was bound to furnish a safe train for the transportation of passengers and the men who were to handle the train, but the defendant was compelled to act through employes in the discharge of its obligations to the public and its employes, and the defendant employed the deceased, who was a conductor of long experience, to inspect the train in question, and determine whether it was or was not a safe and adequate train. The deceased was the one man upon whom the duty to inspect was devolved. Nor can we assent to the proposition that the representative of the deceased can recover damages which may have resulted from a failure of the conductor to discharge the duty of inspection. But in this case the undisputed evidence shows that the conductor was informed at Minot as to the injury to the steps, and that he personally examined the passageway, and after such examination he accepted the train with the broken steps, and said he guessed it would be all right. He was again informed of the condition of the steps by the brakeman and the car porter, and then gave no direction to tie the gate, but simply directed the porter to keep the rear door of the sleeper locked, and watch it. The deceased, therefore, did inspect the train, and did discover the defective steps, and after such inspection accepted the train and used it, but did not at any time either tie the gate or direct that it should be tied, despite the fact that the gate was tied with a rope when it came into Minot. The complaint charges that the defendant failed to tie and securely fasten this gate, and this averment embodies the specific act of negligence charged against the defendant. But it is too obvious for discussion that, if the omission to tie the gate under the circumstances was negligence, then the person whose duty it was to tie it or cause it to be tied was the identical person who was guilty of such negligence. If the car was unsafe for the use of passengers and trainmen, it was the special duty of the conductor either to make it safe or to reject it from the train. The complaint charges that it could have been conviently made safe by securely fastening the platform gate, and all the evidence shows that the car would have been safe and adequate for all on board the train if this precaution had been taken. Upon this state of facts we hold without hesitation that no recovery can be had by the plaintiff on account of the negligence charged. This action can only be maintained

in cases where the deceased could have himself recovered damages for the same injury if it had not resulted fatally. See Tiffany, Death Wrongful Act, § 63, and cases cited. If the deceased had been injured, but not killed, he could have recovered damages only by showing that his own neglect had not contributed to the injury. This would be impossible to do under the evidence in this case. No action will lie for injuries caused by negligence in a case where the only negligence complained of is that of the plaintiff himself, and certainly a plaintiff cannot recover where his own want of due care is the direct, efficient, and sole cause of the injury. In disposing of the case we have had occasion to apply to the facts in the record only well-established principles of the law of negligence, and, as these are elementary, and familiar to the profession, we deem it unnecessary to cite cases in their support. Under the undisputed evidence the plaintiff cannot recover. The judgment for the defendant must be affirmed. The other judges concurring.

(80 N. W. Rep. 885.)

F. A. GILMAN *vs.* THE TOWNSHIP OF GILBY.

Opinion filed November 2, 1899.

Principal and Agent—Delivery of Goods—Sale.

The delivery of goods by a principal to his agent, to be sold by the latter upon commission only, does not amount to a sale to such agent.

Taking of Money Judgment Not Payment—Waiver.

The mere taking of a money judgment by a principal against his agent for the value of goods wrongfully withheld by the latter does not alone operate to invest the agent with the title to the property so withheld. Payment of the judgment is necessary.

Township Warrants Non Negotiable—Judgment No Estoppel Until Paid.

Defendant purchased two road machines from an Illinois corporation through the latter's agents, and issued a township warrant in payment therefor, payable to such agents. Under the contract between the corporation and its agents, the title to the machines and the order taken therefor was in the former. Said order was transferred to plaintiff for value. Defendant paid the principal directly the amount represented by such warrant. *Held*, that said warrant is subject to the same defenses as in the hands of the original payees. *Held*, further, that the subsequent rendition of a money judgment in favor of the principal against its agents for the value of the road machines in question does not operate to clothe such agents with the title to said machines or the warrant issued in payment for the same, it not appearing that such judgment is paid.

Appeal from District Court, Grand Forks County; *Fisk*, J.

Action by F. A. Gilman against the Township of Gilby. Judgment for defendant, and plaintiff appeals.

Affirmed.

McDermont & Mayer, for appellant.

The Western Wheeled Scraper Company treated their transaction with Lytle & Martine as a sale and attached the order in suit by garnishment proceeding, as the property of their agents. This garnishment proceeding is entirely inconsistent with its present claim of title and ownership. *Moline Plow Co.* v. *Rodgers,* 37 N. W. Rep. 111. The judgment roll in the case of the Western Wheeled Scraper Company against Lytle & Martine was admissible in evidence. It is within the exception to the rule that a judgment binds only parties and privies, viz: a former judgment establishing rights and relations between the parties to it, is admissible against a person not a party or privy for the purpose of proving that the plaintiff in the former judgment sustained to the defendant therein the relation established thereby. *Railroad Equipment Co.* v. *Blair,* 39 N. E. Rep. 962; Van Fleet's Former Adjudications, 910-922. Also admissible for the purpose of establishing an estoppel in pais. 2 Van Fleet's Former Adjudications, 914-915. The road machines for which the Gilby Township order was given were sold to Lytle & Martine, and the purchase price of the same reduced to judgment. The scraper company had two methods of redress so inconsistent that the assertion of one involved the negation of the other. *Bank of Beloit* v. *Beal,* 34 N. Y. App. 473; *National Bank of Illinois* v. *National Bank of Emporia,* 45 Pac. Rep. 79; *Thompson* v. *Howard,* 31 Mich. 309; *Riley* v. *Albany Savings Bank,* 43 N. Y. 520; *Kearney, etc., Co.* v. *Ry. Co.,* 66 N. W. Rep. 159; *Compton* v. *Beach,* 25 Atl. Rep. 446; 4 L. R. A. 145; *Nield* v. *Burton,* 22 N. W. Rep. 906; *Fowler* v. *Bowery Sav. Bank,* 113 N. Y. 450; *First Nat. Bank* v. *McKinney,* 66 N. W. Rep. 280; *Bowen* v. *Mandeville,* 95 N. Y. 240; 36 L. R. A. 193; *Spalding* v. *Page,* 1 Saw. 702; *Bank* v. *Adams,* 20 How. Pr. 335, 7 Bosw. 316; Biglow on Estoppel, 562; Pomeroy's Remedies, 110-493, 567-573; *Stuart* v. *Hayden,* 36 U. S. App. 462, 72 Fed. Rep. 402; *Moline Plow Co.* v. *Rodgers,* 37 Pac. Rep. 110; 7 Enc. Pl. & Pr. 364.

Cochrane & Corliss, for respondent.

The judgment roll from the Minnesota court in the action against Lytle & Martine was offered in evidence for the sole purpose of showing that the Scraper Company had by virtue of judicial proceedings in Minnesota waived or lost its title to the warrant in suit. It was not offered or received to prove an alleged copy of the contract attached as an exhibit to the complaint in that judgment roll. That judgment is not evidence against this defendant with respect to the existence or terms of a written contract between the Scraper Company and Lytle & Martine. *Tierney* v. *Phoenix Ins. Co.,* 4 N. D. 565-568, 62 N. W. Rep. 642. Even under the written instrument Lytle & Martine did not become the owners of the property shipped them. *Metropolitan Nat. Bank* v. *Benedict Co.,* 74 Fed Rep. 182; *Burton* v. *Goodspeed,* 69 Ill. 237; *Norton* v. *Mellick,* 97 Ia. 564; *Walker* v. *Butterick,* 105 Mass. 237; *National Cordage Co.* v. *Sims,* 44 Neb. 148; *Sturm* v. *Baker,* 150 U. S. 312, 14 S. C.

R. 99; *Lenz* v. *Harrison,* 148 Ill. 598; *Balderstone* v. *National Rubber Co.,* 18 R. I. 338, 27 Atl. Rep. 507; *Barnes Safe & Lock Co.* v. *Blach Bros.,* 38 W. Va. 158, 18 S. E. Rep. 482; *National Bank* v. *Goodyear,* 90 Ga. 711, 16 S. E. Rep. 962; *Melburn Mfg. Co.* v. *Peak,* 89 Tex. 209; *Moline Plow Co.* v. *Rodgers,* 53 Kan. 743. The recovery of judgment in the Minnesota court, in an action for conversion, did not divest the Scraper Company of its title to the property converted or vest the title in the defendant. Until that judgment is paid and satisfied this defense is competent. *Miller* v. *Hyde,* 161 Mass. 472; 42 Am. St. Rep. 434; *Atwater* v. *Tupper,* 45 Conn. 144; *Turner* v. *Brock,* 6 Heisk. 50; *Lovejoy* v. *Murray,* 3 Wall. 1; *Brimsmead* v. *Harrison,* L. R. 7 C. P. 547; *Ex parte Drake,* 5 Ch. D. 866; *Tolman Co.* v. *Waite,* 78 N. W. Rep. 124; *Mitchell* v. *Shaw,* 53 Mo. App. 652; Freeman on Judgments, § 237; 1 Greenl. Ev. § 533, n.; 15 Am. & Eng. Enc. L. 347. The Minnesota judgment cannot operate as an estoppel, because it does not appear upon the face of the judgment record that that court ever adjudicated against the company and in favor of Lytle & Martine as to the ownership of the order in question. *Fahey* v. *Esterly Machine Co.,* 3 N. D. 222, 55 N. W. Rep. 580. The warrant in suit was not a negotiable instrument and therefore the plaintiff obtained no better title thereto than Lytle & Martine from whom he purchased. *Goose River Bank* v. *School Township,* 1 N. D. 26; *Goodwin* v. *Town,* 28 Atl. Rep. 877-885; *West Fidelity L. & S. Co.* v. *Olympia,* 52 Pac. Rep. 1015; 15 Am. & Eng. Enc. L. 1208; *Merrill* v. *Monticello,* 138 U. S. 673.

YOUNG, J. This is an action to recover upon a township warrant issued by the defendant township in payment for two road machines purchased by it from the Western Wheeled Scraper Company through the latter's agents. The warrant bears date June 26, 1893, is for $500, and is payable on its face to Lytle & Martine, who were then the company's agents for the sale of scrapers in this state. The complaint alleges that the warrant in question was transferred for value, and by proper indorsements, first by the payees to William G. Martine, then by the latter to the plaintiff, and that it is unpaid. The defense is that this warrant belonged to the Western Wheeled Scraper Company, and not to its agents, and that the debt represented by it has been paid, and in this connection the answer alleges that it was issued for the purpose of paying that company for the two scrapers purchased from it by the defendant, and that said warrant was made payable to Lytle & Martine solely in reliance upon their representations that they had authority from their principal to receive payment in that form. Further, that in September, 1895, thereafter, the defendant, acting upon assurances that said warrant had been lost, issued another warrant in lieu thereof for the same amount, but payable to the Western Wheeled Scraper Company, and that this last warrant has been paid. The case was tried in the District Court without a jury, and a judgment was ordered

and entered dismissing the action. Plaintiff brings the case here for trial anew.

The facts from which the case is to be determined are practically undisputed. That defendant has paid for the scrapers, as alleged, is conceded. It is also clearly established that the title to all scrapers consigned to Lytle & Martine for sale, as well as the gross proceeds of such sales, in whatever form they might be, was in the Western Wheeled Scraper Company. In fact, it is not claimed by appellant that the transaction between the company and its agents amounted to a sale to the latter, or that Lytle & Martine ever had title to the scrapers sold to the defendant. Such a position would not be tenable under such a contract. *Metropolitan Nat. Bank* v. *Benedict Co.*, 20 C. C. A. 377, 74 Fed. Rep. 182; *Norton* v. *Melick*, 97 Ia. 564, 66 N. W. Rep. 780; *Walker* v. *Butterick*, 105 Mass. 237; *Sturm* v. *Boker*, 150 U. S. 313, 14 Sup. Ct. Rep. 99. It is clear, too, that the warrant in suit is not negotiable in the sense of cutting off defenses which might have been made against the original payee. *Goose River Bank* v. *Willow Lake School Twp.*, 1 N. D. 26, 44 N. W. Rep. 1002. The plaintiff has then only the rights of Lytle & Martine. It has been shown that they had no title either to the scrapers sold or to the proceeds of sales, and hence did not own this warrant although it was taken in their name; and consequently they could transfer no title to it. But it is plaintiff's contention that the company waived and lost its title to both the scrapers and proceeds by taking a judgment against such agents for their value, and that by so doing "the company elected to repudiate any interest or ownership that it may have had in them prior thereto, and forever estopped itself from subsequently claiming them as its own." Upon this contention rests plaintiff's whole case,. In support of this alleged waiver the plaintiff offered in evidence in rebuttal the judgment roll in a case entitled "Western Wheeled Scraper Company vs. James E. Lytle and W. G. Martine and Lytle & Martine," tried in the District Court of Hennepin county, Minn. This was objected to by defendant's counsel as "incompentent, irrelevant, and immaterial, and not being a judgment between the parties to this action. Pursuant to the requirements of section 5630, Rev. Codes, as amended by chapter 5 of the Laws of 1897, under which the case was tried, the same was received into the record and is before us upon the same objection. We find no ruling upon the objection, but it is evident that the trial judge did not consider the judgment at all, or at least gave no weight to it as supporting appellant's contention, for it appears in the records before us that he not only found that the warrant here in suit was not the property of Lytle & Martine, and was the property of the Western Wheeled Scraper Company, but also that said company had never "elected to treat the same as the property of said Lytle & Martine, or estopped itself from claiming title thereto." We think this conclusion of the trial court was correct, and, further, that the judgment roll offered was not admissible in evidence for the purposes for which it was offered, namely, for the purpose of

showing a waiver of or estoppel to assert title to the warrant in question in the Western Wheeled Scraper Company. Plaintiff's position is that in the judgment offered in evidence the Western Wheeled Scraper Company had a money recovery against its agents for the very scrapers for which this warrant was given, and that by taking a money judgment it conclusively waived its claim of ownership; in other words, it cannot have a judgment for the value of the goods not accounted for, and assert title to the proceeds of the sale at the same time. An examination of the papers which constitute the judgment roll discloses that the action was in equity, instituted by the company against its agents for the purpose of obtaining an accounting from them for a large number of machines intrusted to them for sale; also to recover the possession of the specific proceeds of sales made, the warrant here in suit being expressly mentioned; further, to enjoin said agents from disposing of either the machines or proceeds, including this warrant. It appears that such an enjoining order was issued; further, that a receiver was appointed to recover the company's property, and that a large number of machines were taken possession of by the receivers, and delivered to the company, under the order of the court; also that the court found that the title to all property intrusted to said agents, as well as the title to the proceeds, including the warrant in question, was in the company; but this warrant did not come into the hands of the receiver. Thereafter an accounting was made by the court in accordance with the terms of the contract between the company and Lytle & Martine, and a money judgment rendered against the latter for the value of such goods as they had failed to account for, and which the receiver had failed to obtain possession of. Plaintiff contends, too, that by taking this judgment the company elected to treat the transaction as a sale to the agents. We think not. It appears from the papers offered that the company continually asserted its title to the property in question, and was then invoking the aid of the court to secure its possession; further, that the judgment rendered was no more than a judgment for the value of the property wrongfully withheld by the agents. It certainly is not different from a judgment in conversion, and it is well settled by the great weight of modern authority that a judgment for the conversion of property does not operate to extinguish the owner's title to the property converted, and vest it in the wrongdoer. The common-law rule was undoubtedly the other way, but that was based upon the certainty of redress afforded by that remedy which could then be enforced by the imprisonment of the debtor's person. It is probable that the present inadequacy of an ordinary judgment and its emptiness as a remedy has contributed to the change in the rule, but, at any rate, the doctrine is well settled now that a judgment for conversion does not bar the right to assert title to the property converted, and that the bar arises only upon payment of the judgment. *Lovejoy* v. *Murray*, 3 Wall. 1; *Hep-*

burn v. *Sewell,* 9 Am. Dec. 512; *Smith* v. *Smith,* 50 N. H. 212; *McReady* v. *Rogers,* 1 Neb. 124; *Hyde* v. *Noble,* 13 N. H. 494; *Mitchell* v. *Shaw,* 53 Mo. App. 652; *Miller* v. *Hyde,* 161 Mass. 472, 37 N. E. Rep. 760; *Sharp* v. *Gray,* 5 B. Mon. 4; *Morgan* v. *Chester,* 4 Conn. 387; 1 Greenl. Ev. § 533; 1 Freem. Judgm. § 237; 15 Am. & Eng. Enc. L. 347. The judgment offered in evidence showed that it was wholly unsatisfied. It was not admissible, therefore, to show a waiver of title,—the only purpose for which it was offered. It developed upon the cross-examination of the plaintiff that legal steps of some nature to get possession of the warrant were taken by the company while it was lodged in one of the banks of Minneapolis. Just what they were we cannot determine, as the evidence is very obscure on that point, but it seems that they were auxiliary to the main action wherein the judgment was rendered to which we have referred. They need not, therefore, be separately discussed. The judgment of the District Court is affirmed. All concur.

(80 N. W. Rep. 889.)

INDEX.

ABSTRACTS ON APPEAL. See APPEAL AND ERROR.

Chapter 5, Laws 1897, does not annul the rule of court requiring the abstract of the record to be an abridgment of the evidence and a condensation of the mass found in the record. Farmers' and Merchants' Nat. Bank v. Davis, 83.

Where the abstract is merely a rescript of the reporter's notes, embodying all the evidence, rulings, objections and exceptions had or taken at the trial without condensation, the same was stricken from the files on motion, as not in compliance with the statute or rules of court. McTavish v. Great Northern Ry. Co., 94.

Under Chapter 38, Laws 1897, if the appellant print his abstract on appeal in cases where the amount of the judgment exclusive of costs does not exceed three hundred dollars, he cannot recover as costs the expense of such printing. Black v. Minneapolis & Northern Elevator Co., 96; Ingwaldson v. Skrivseth, 544.

An appeal will not be dismissed on the ground that the abstract and briefs are typewritten and not printed. Oliver v. Wilson, 590.

ABUTTING OWNERS. See MUNICIPAL CORPORATIONS, 504.

ACCOMPLICE. See CRIMINAL LAW, 563; INCEST, 563.

ACCOUNTING. See PARTNERSHIP, 515.

ACCOUNT STATED.

Evidence examined and *held* under the facts stated in the opinion that a settlement of the differences between the parties was sufficiently made out. Canfield v. Robertson, 603.

When partners have made a settlement of their accounts in whole or in part, and reduced it to writing, they are concluded thereby, and the courts will not disregard it when it is free from fraud, duress, misrepresentation or concealment or mistake of fact. Lay v. Emery, 515.

ACTION OR SUIT. See LIMITATION OF ACTIONS, 115.

A suit cannot be maintained for the purchase price of intoxicating liquors unlawfully sold, without first making a demand for the money so paid, under section 7621, Rev. Codes. Oswald v. Moran, 111.

A defendant who appears before a justice of the peace on the adjourned day, and, without withdrawing a general appearance, attempts to appear specially for the purpose of moving a dismissal of the case for alleged want of jurisdiction, growing out of the last continuance, and because there was no security for costs, restores jurisdiction of person, if it had been lost, where, after the denial of the motion, he made further motions and participated in a trial on the merits. Benoit v. Revoir, 226.

An action for foreclosure cannot be united in the same complaint with an action ex delicto. Mares v. Wormington, 329.

ACTION OR SUIT—Continued.

In an action brought to quiet title the court may adjudicate upon the validity of any liens which are derived through or under a tax sale or sales, but liens not so derived cannot be passed upon in such an action. McHenry v. Kidder County, 413.

An action in equity in the nature of a suit to foreclose a mortgage does not lie to foreclose a lien upon land created by tax levy. McHenry v. Kidder County, 413.

An action must be brought in the name of the real party in interest. Smith v. Security L. & T. Co., 451.

ADEQUATE LEGAL REMEDY. See MANDAMUS, 590.

ADOPTION. See SUCCESSION, 376; BASTARD, 376.

Chapter 8 of the Civil Code, relating to the adoption by adult persons of minor children other than their own by the procedure therein provided, requires that the persons adopting be inhabitants of the state. Eddie v. Eddie, 376.

Section 2806, Rev. Codes, which provides for the adoption of an illegitimate child by its father by acts and conduct, construed. The adoption in law which results from the adoption in fact is the same in legal effect as that resulting from an adoption by decree of court. The adopting parent must be domiciled within the state when the act of adoption occurs. Where both the father, mother, and their illegitimate children were domiciled in a foreign kingdom, whose laws made no provision for the adoption of illegitimate children by their father, the conduct of the father toward them in recognizing them as his own children, treating them as such, and contributing to their support, all occurring in the foreign state, and entirely discontinued after leaving the foreign country and coming into this jurisdiction does not constitute an adoption under the laws of this state. Eddie v. Eddie, 376.

ADVERSE CLAIMS. See QUIETING TITLE, 413; TAXATION, 413, 504.

AFFIDAVITS.

An affidavit which is used as the basis for a warrant of arrest in insolvency proceedings, and in which the probative facts by which it is sought to establish the existence of the ultimate facts required by the statute are alleged upon information and belief, but no grounds for such information and belief are stated, is insufficient to give the court jurisdiction to issue a warrant of arrest in that particular case. Kaeppler v. Bank, 406.

AGENCY. See PRINCIPAL AND AGENT, 108-515, 35, 382, 99.

The fact that a promissory note is payable at a particular office does not make the party in charge of the office the agent of the holder of such note to receive payment unless the note be actually in the the possession of such party. Stolzman v. Wyman, 108.

ALIMONY.

A decree of divorce was granted on the husband's application. The decree directed that the plaintiff should "provide, care for, maintain, and educate" a minor son of plaintiff and defendant, but did not change the custody of the child from where the law placed it, or direct that any special sum be applied to the purposes named. *Held*, that the decree did not change the statutory duties or rights of plaintiff touching such son. Glynn v. Glynn, 233.

ALIMONY—Continued.

Under our statute, when a divorce is granted to the husband for the fault of the wife the Court has no power to make any allowance by way of support or maintenance for the wife; and when, in such a case, the plaintiff agreed that he would pay the defendant a certain sum per month, and that an order to that effect might be entered in the decree, and the same was accordingly done, the amount so ordered to be paid was not alimony, but arose from express contract, and payment could not be enforced by an attachment for contempt. Glynn v. Glynn, 233.

AMENDMENTS. See PLEADINGS, 220.

To arbitrarily refuse to allow an amendment which should be allowed is an improper exercise of judicial discretion. Martin v. Luger Furniture Co., 220.

ANSWER. See PLEADINGS, 111, 424, 105, 220-77; COUNTERCLAIM, 111, 105, 77; AMENDMENTS, 220.

APPEAL AND ERROR. See INSTRUCTIONS, 182; HABEAS CORPUS, 166; SPECIAL PROCEEDING, 166; MANDAMUS, 590; NEW TRIALS, 191.

An order dismissing an action for failure of proof is not appealable. Cameron v. Great Northern Ry. Co., 124.

An order dismissing the action, at the close of plaintiff's evidence, for failure of proof, which, without any change of form or terms, is entered in the judgment book of the clerk of court, concluding as follows: "The plaintiff's action is hereby dismissed. Done in open court" on a specified date is appealable as a final judgment, although it is improper in form. Cameron v. Great Northern Ry. Co., 124.

The trial court in vacating a verdict and granting a new trial on the ground of insufficient evidence acts within judicial discretion which will not be disturbed on appeal, except in cases of manifest abuse. Dinnie v. Johnson, 153.

In an action to recover the purchase price of brick, alleged to have been sold under an oral agreement, an instruction that the only issue is whether a contract was entered into between the parties is reversible error where the sale was within the statute of frauds, and the delivery receipt and acceptance of the brick by the defendant were controverted. Dinnie v. Johnson, 153.

A final order in a habeas corpus case is not a final order in a special proceeding so as to be appealable under Rev. Codes, Sec. 5626. Carruth v. Taylor, 166.

Under the facts in this case, an instruction to the jury that "the line as fixed by the surveyor at this time is presumptively correct," cannot be upheld under section 2028, Rev. Codes, and constitutes reversible error. Radford v. Johnson, 182.

An order granting a new trial will be affirmed on appeal where the record shows that although the case was tried as an action at law, and to a jury, it was exclusively of equity jurisdiction, even though no special objection was made by either party to such method of trial, as the verdict of a jury in an equity case is only advisory. Prondzinski v. Garbutt, 191.

In a claim and delivery action the plaintiff sought to recover certain grain grown by defendant upon land upon which defendant had long resided. Plaintiff based his right to recover solely upon a certain

APPEAL AND ERROR.—Continued.

written contract, which he put in evidence. Defendant offered evidence to show that the contract under which the plaintiff claimed had, by mutual understanding between the parties, never gone into effect, and that the grain in question was not raised pursuant to the terms of such contract. This evidence was excluded. *Held*, error. Lane v. O'Toole, 210.

To arbitrarily refuse to allow an amendment which should be allowed is an improper exercise of judicial discretion and prejudicial error. Martin v. Luger Furniture Co., 220.

To take an appeal to the Supreme Court from an order or judgment of the District Court, in addition to serving a notice, it is essential that the notice should be filed with the clerk of the District Court within the time limited for taking an appeal. Stierlen v. Stierlen, 297.

The language, "the appeal shall be deemed taken by the serving of the notice," must be construed to refer to both the filing and service, inasmuch as the filing constitutes a service of notice of the appeal upon the clerk. Stierlen v. Stierlen, 297.

Where a notice of appeal from an order was served upon the party within the statutory time for such service, but such notice was not filed with the clerk of the District Court until after the expiration of the statutory period, such omission was fatal to the appeal. Stierlen v. Stierlen, 297.

The failure to file a statement of the case on which the motion for a new trial is based cannot be first raised on appeal. Plano Mfg. Co. v. Jones, 315.

An order dismissing an action for failure of proof is not appealable. Hanberg v. National Bank of Wahpeton, 328.

A statement of the case on which the motion for a new trial was based embraced no attempt to state the particulars in which the evidence was alleged to be insufficient to support the verdict. The trial court granted a new trial on the sole ground that the verdict was not justified by the evidence, which was reversible error under Rev. Codes, Sec. 5467, because of the want of such specification of particulars. *Held*, that in the absence of any claim that particular specifications were in fact actually drawn up and used by counsel or consided by the court on the hearing of the motion, the record will not be remanded to the trial court for the purpose of amending it by inserting specifications of particulars pointing out wherein the evidence is insufficient. Baumer v. French, 319.

Upon a proper showing, a record sent to the Supreme Court on appeal will be returned to the District Court for correction and amendment; but in such cases the District Court is authorized only to supply defects and omissions in the record by inserting therein any matter of fact or of procedure which was before the trial court and upon which it acted in making the rulings which are sought to be reviewed on appeal. Nothing new, however vital it may be to the case, can be first originated and then interpolated in the record to be returned to the Supreme Court. Baumer v. French, 319.

Where the entry of judgment in the judgment book constitutes the judgment, and not merely the evidence of the judgment, the entry of judgment on November 28th nunc pro tunc as of the 17th of the preceding April cannot make effective an attempted appeal from said judgment, taken during the intervening June, in the mistaken belief that there was a judgment in the case. McTavish v. Great Northern Ry. Co., 333.

APPEAL AND ERROR.—Continued.

Where an action was tried in the lower court as an action for conversion, the point cannot be raised for the first time in this Court that the action was in fact replevin, and that the verdict is not such as the law requires in that form of action. Marshall v. Andrews & Gage, 364.

Where a complaint in an action states, in a single count, facts that constitute a cause of action for false imprisonment and also for malicious prosecution, and where plaintiff, at the close of the testimony, moved for a directed verdict in his favor upon stated grounds, and which motion should have been sustained if the action was false imprisonment, but should have been denied if the action was malicious prosecution, and where, immediately upon the denial of such motion, plaintiff requested an instruction to the jury, which was given, and which limited any recovery in the case to damages for malicious prosecution, *held*, that plaintiff could not urge in this Court, as ground of reversal, that the trial court erred in denying the motion for verdict. Kaeppler v. Red River Valley Nat. Bank, 406.

Under the evidence in a case tried to the court without a jury, where this Court is unable to determine the state of the account as between plaintiffs and the defendant, the matter of the accounting asked for by the plaintiffs will not be passed upon or determined, but the same will be left open for future determination. O'Toole v. Omlie, 444.

Section 5234, Rev. Codes, provides that in the case of a transfer of interest pendente lite, other than the death or disability of a party to the action, shall be continued in the name of the original party, or the court may allow the transferee to be substituted in the action. *Held*, that where a purchaser pendente lite might have been made a party defendant in the court below, he may be heard in the Supreme Court to oppose a motion to dismiss the appeal. Anheier v. Signor, 499.

Upon appeal to the Supreme Court where the amount of the judgment appealed from is less than $300.00 the successful party is not entitled to tax as costs the expense of printing abstract or brief, such disbursement being unnecessary. Ingwaldson v. Skrivseth, 544.

The decision of the trial court in allowing a challenge to a juror is entitled to great respect and will not be disturbed except in clear case of abuse. State v. Ekanger, 559.

An order denying a motion for a new trial, which is based on the insufficiency of the evidence to justify the verdict, will not be disturbed where it appears that there is substantial conflict in the evidence. Becker v. Duncan, 600.

A verdict rendered on conflicting evidence will not be disturbed on appeal. Muri v. White, 58.

The discretion of a trial court in denying a motion for a new trial will not be interfered with on appeal except in cases of abuse where the ground for the motion is insufficiency of the evidence, or newly discovered evidence. Heyrock v. McKenzie, 601.

In actions tried in the District court without a jury, under the provisions of chapter 5, Laws 1897, a statement of the case must be settled on appeal, embracing either a specification of particular facts which the appellant desires this Court to review, or a statement that the appellant desires a review of the entire case in this Court. Ricks v. Bergsvendsen, 578.

APPEAL AND ERROR.—Continued.

The Supreme Court is without authority or legal right to try a case anew where it appears that no statement of the case was ever settled and that the bill of exceptions in the record embraces none of the requisite specifications which are essential to a trial denovo. Ricks v. Bergsvendsen, 578.

The notice of appeal and certificate of the trial court, stating that the appellant desires a new trial in the Supreme Court, are inoperative and do not confer authority upon the Supreme Court to review the case upon the evidence where the statement of the case contains no specifications of the particular facts which the appellant desired the Supreme Court to review. Following Bank v. Davis, 8 N. D. 83. Ricks v. Bergsvendsen, 578.

After a hearing upon the merits the trial court directed the clerk to enter judgment in favor of the plaintiff for his costs and disbursements. After the service of said order, such judgment was entered; but prior to the entry of such judgment and subsequent to the order, the defendant served a notice of appeal to the Supreme Court, stating that the appeal was taken both from the order and from the judgment, *held*, that the appeal was premature and inoperative as to the judgment, but that the order is an appealable order, inasmuch as it is a final order affecting a substantial right made in a special proceeding, therefore a motion to dismiss the appeal as to the order was denied. Oliver v. Wilson, 590.

An order directing a peremptory writ of mandamus to issue is a final order affecting a substantial right made in a special proceeding within subdivision 2, Sec. 5626, Rev. Codes. Oliver v. Wilson, 590.

The abstracts and briefs filed in this Court were typewritten and the brief contained no reference to the pages of the abstract. Respondent moved to dismiss the appeal because the abstract and brief were not printed, and for said defect in the briefs. These grounds furnished no reason for dismissing an appeal; following State v. McKnight, 7 N. D. 444. Oliver v. Wilson, 590.

In equity cases where the District Court calls a jury for advisory purposes, the trial is not governed by the provisions of Sec. 5630, Rev. Codes, as amended by chapter 5, Laws 1897, nor does the Supreme Court try such cases anew. The statute applies only to such cases as are tried in the District Court without a jury. Peckham v. Van Bergen, 595.

An order appealed from made upon an application based wholly upon certain papers and documents all of which were transmitted to the Supreme Court with the original order, no oral evidence having been offered upon the application for the order. No statement of the case was settled. The respondent moved to strike from the records certain papers and documents, on the ground that the same could not properly be transmitted to the Supreme Court on appeal from an order, in the absence of a statement of the case. Denied. Oliver v. Wilson, 590.

Under Rev. Codes, Sec. 5630, requiring the statement of the case to contain all the evidence offered at the trial, the Supreme Court will not review the evidence for the purpose of deciding whether the findings of fact are justified by the evidence, in a case where the certificate of the court below fails to show that all of the evidence offered at the trial is certified to the Supreme Court. Edmonson v. White, 72.

Under a certificate of the trial court that the statement of the case contained all the evidence "considered and proceedings had," the evidence cannot be reviewed. Edmonson v. White, 72.

APPEAL AND ERROR—Continued.

Where the certificate of the trial court stated that the statement contained all the evidence "considered and proceedings had," findings of fact proposed and refused below cannot be inquired into. Edmonson v. White, 72.

The record included a statement of the case, which declared that it "contains in itself all the bill of exceptions, and a true statement of of the evidence in the case, as by section 5467 of the Code of Civil Procedure required." To this stipulation the trial judge appended the following certificate: "The foregoing statement of the case is settled and allowed this 25th day of August, A. D. 1898." The record further embraced the declaration that the appellant "desired a review of the entire case in the Supreme Court." *Held*, that the certificate of the trial court fails to state that the record embraces all the evidence offered at the trial; and hence, under Rev. Codes, Sec. 5630, as amended by Session Laws 1897, chapter 5, the entire case is not in a condition to be tried anew in the Supreme Court upon the facts. Farmers' & Merchants' Nat. Bank v. Davis, 83.

A rule of the District Court which requires a suitor who desires a transcript of a portion of the stenographic notes of the testimony to prepare a statement of the case for settlement, to file with the clerk of the court a transcript of the entire testimony in the case, is in violation of Rev. Codes, Secs. 414, 417, 5467. Kaeppler v. Pollock, 59.

Revised Codes, Sec. 5630, as amended by Sess. Laws 1897, chapter 5, requires appellant to incorporate with the statement of the case, where he desires only to review one or more particular facts, a specification pointing out such particular facts; and, when appellant desires a retrial of the whole case in the Supreme Court, that fact must also be specified in the statement of the case. Farmers' & Merchants' Nat. Bank v. Davis, 83.

The fact that Rev. Codes, Sec. 5630, as amended by Sess. Laws 1897, chapter 5, nowhere provides that the evidence in the statement shall be pruned of its superfluous matter, does not annul the rule of the Supreme Court requiring the abstract of the record to be an abridgment of the evidence. Farmers' & Merchants' Nat. Bank v. Davis, 83.

Under Sess. Laws 1897, chapter 38, which provides that, where the judgment appealed from does not exceed $300 no printed abstracts or briefs shall be required, either party to an appeal in such case may, at his option, print his abstract and brief, but cannot be required to do so by the Supreme Court. Black v. Minneapolis & Nor. Elevator Co., 96.

In cases tried by a jury the appellate court will not examine the evidence further than to determine whether it is sufficient to sustain the verdict. Howland v. Ink, 63.

In order to obtain a review of a ruling in striking out a counterclaim on motion defendant need not offer testimony in support thereof. Twp. of Noble v. Aasen, 77.

An order striking a counterclaim from the files for failure to state facts sufficient to constitute a counterclaim can be reviewed on appeal from a final judgment under Sec. 5626, Rev. Codes, as an intermediate order involving the merits and necessarily affecting the judgment. Twp. of Noble v. Aasen, 77.

Where the certificate of the trial judge to a stated case tried under Sec. 5630, Rev. Codes, as amended by Ch. 5, Laws 1897, failed to state that the record sent to the Supreme Court embraces all the evidence offered at the trial, the Supreme Court will not consider the appeal. Farmers' & Merchants' Nat. Bank v. Davis, 83.

APPEAL AND ERROR—Continued.

Under chapter 5, Laws 1897, specifications of errors of law and of particulars wherein the evidence does not justify findings of fact as required by prior statutes and rules of court are no longer required. Farmers' & Merchants' Nat. Bank v. Davis, 83.

Under chapter 5, Laws 1897, it is no longer necessary to reduce the evidence to narrative form in the stated case. Farmers' & Merchants' Nat. Bank v. Davis, 83.

The rule requiring the record to be abridged in the printed abstract on appeal or the rule requiring points to be assigned in the briefs of counsel for appellant, is not abrogated by chapter 5, Laws 1897, doing away with the necessity of reducing to narrative form the evidence in stated case. Farmers' & Merchants' Nat. Bank v. Davis, 83.

On appeal in cases tried to the court without a jury under Sec. 5630, Rev. Codes, as amended by chapter 5, Laws 1897, a failure to specify the question of fact desired to be reviewed or to state that a trial de novo of the entire case is sought, will preclude a retrial of any fact within the issues. Farmers' & Merchants' Nat. Bank v. Davis, 83.

A motion to strike a statement of the case and abstract from the files will be granted where they have been made and certified in disregard of statutory provisions and the rules of court, and this notwithstanding the counsel have obtained the settlement of the case by stipulation. McTavish v. Great Northern Ry. Co., 94.

The preparation of statements of the case and abstracts thereof is regulated by statute and rules of court and these cannot be superceded by the combined action of counsel and the trial court from which the record is transmitted. McTavish v. Great Northern Ry. Co., 94.

The Supreme Court did not consider an assignment of error predicated upon a refusal of the trial court to hold a defendant to bail on motion of the state's attorney after a verdict of acquittal by direction of the court because the order was subsequent to the order appealed from and in no way connected therewith. State v. Crawford, 539.

Statements framed in violation of the statute and rules of court cannot be authorized by agreement of counsel, though such agreement is sanctioned by the trial court. McTavish v. Great Northern Ry. Co., 333.

A motion for the direction of a verdict made at the close of plaintiff's testimony is waived unless renewed after all the testimony is in. Tetrault v. O'Connor, 15.

In an action of claim and delivery by a chattel mortgagee to recover possession of the property after default, the mortgagor cannot urge for the first time on appeal that his wife is the owner of the property. James v. Wilson, 186.

Respondent cannot urge on appeal that the printed abstract fails to show that his mortgage contains a stipulation entitling him to possession of the chattels therein described after default in payment where it is not contended that the mortgage in fact lacked such a stipulation and the point was not raised below. James v. Wilson, 186.

Constitutional questions argued but not involved in the case will not be considered. Chicago, M. & St. P. Ry. Co. v. Cass County, 18.

Construing section 5630, Rev. Codes. In this action no statement of the case was ever settled. In lieu of a statement, the trial judge transmitted to this Court certain papers, to which he appends a certificate to the effect that the same embrace all the evidence and pro-

APPEAL AND ERROR—Coutinued.

ceedings had at the trial upon which the findings were made. A motion in behalf of the respondent to strike out all of the record sent to this Court, except the pleadings, findings, and judgment, was granted. A mere rescript of the evidence and proceedings as preserved by the reporter does not constitute a statement of the case, and will not be so regarded in this Court. Brynjolfson v. Thingvalla, 106.

Certain assignments of error subjoined to the appellant's brief considered, and *held* to be insufficient, under rule 12 of the rules of this Court, 6 N. D. xviii. Brynjolfson v. Thingvalla, 106.

APPEARANCE.

A general appearance is a submission to the jurisdiction of the court and waives defects of jurisdiction. Benoit v. Revoir, 226.

APPROPRIATIONS. See MUNICIPAL CORPORATIONS, 1.

ARREST.

An affidavit which is used as a basis for a warrant of arrest in insolvency proceedings, and in which the probative facts by which it is sought to establish the existence of the ultimate facts required by the statute are alleged upon information and belief, but no grounds for such information and belief are stated, is insufficient to give the court jurisdiction to issue a warrant of arrest in that particular case. Kaeppler v. Red River Nat. Bank, 406.

ASSAULT. See RAPE, 311; EVIDENCE, 311.

ASSESSMENT. See TAXATION, 504.

ASSIGNMENTS. See BANKS AND BANKING, 499.

A chose in action may be transferred by parole assignment. Roberts v. First National Bank, 474.

A land contract was assigned to "C. C. Schuyler, Cashier," the assignor knowing at the time that Schuyler was the cashier of a certain bank, and being also at the time indebted to the bank. The bank claimed that such assignment was made as security for the payment of such indebtedness, and in a proper action sought to foreclose the assignor's interest thereunder. Whether or not such assignment raised a presumption that it was made to the bank not decided, but *held* that, if such a presumption did arise, it was a rebuttable presumption, and was fully rebutted in this case. Anheier v. Signor, 499.

ASSIGNMENTS OF ERROR. See APPEAL AND ERROR, 106.

An assignment which states in general terms that the conclusion of law found by the trial court is against law, and against the evidence and not based upon a sufficient finding of fact is not sufficiently specific under Supreme Court Rule No. 12. Brynjolfson v. Thingvalla, 106.

The assignments of error must refer to the specifications of errors. Brynjolfson v. Thingvalla, 106.

ASSUMPTION OF RISK. See NEGLIGENCE, 124; TRIAL, 124.

Whether defendant assumed the risk involved in taking charge of a train, in which was a car with steps leading to the rear platform removed, was *held*, under the circumstances of this case, to be a question of fact for the jury. Cameron v. Great Northern Ry Co., 124.

Evidence examined and *held* that deceased assumed the risk of his employment. Cameron v. Great Northern Ry. Co., 618.

ATTACHMENT.

The interest of a pledgor in bank stock pledged is liable to seizure on attachment and sale upon execution under § § 5363 and 5366, Rev. Codes. Second Nat. Bank v. First Nat. Bank, 50.

ATTORNEYS' FEES.

A grantee of mortgaged property cannot on foreclosure be required to pay an attorney's fee stipulated therein when it exceeds the amount allowed by law. First M. E. Church v. Fadden, 162.

AUSTRALIAN BALLOT. See ELECTIONS, 395.

BAILMENTS. See WAREHOUSEMEN, 364, 200.

BALLOTS. See ELECTIONS, 395.

BANKS AND BANKING.

Where a receiver is placed in charge of the assets of a national bank, he stands, as to such assets, in the place of the bank, and is chargeable with knowledge of all facts known to the bank affecting the character of such assets. People's State Bank v. Francis, 369.

A receiver of a bank has authority, upon sufficient consideration, to extend the time of payment of a debt owing such bank, where by so doing he can, in his judgment, strengthen the security he holds for the payment of such debt. People's State Bank v. Francis, 369.

Where an agent for the collection of commercial paper is guilty of negligence with respect to such agency, the measure of such damage is prima facie the amount of the paper, with interest. Commercial Bank v. Red River Valley Nat. Bank, 382.

A note was sent to a bank to collect. The maker was a stockholder and director of the bank and the bank knew that he was largely in debt and would not be able to pay his obligations if pressed by all his creditors. For many weeks after the note reached the bank, the debtor had an unencumbered stock of goods in his store, which was worth $2,500.00, and also real estate partially unencumbered. The bank did not inform its principal of the facts, but withheld information for a long period after the maturity of the note, and replied only in response to a telegram of inquiry. In the interim the bank obtained security from the maker to protect its own claims. *Held*, that the bank is liable to its principal for negligence. Commercial Bank v. Red River Valley Nat. Bank, 382.

A land contract was assigned to C. C. Schuyler, cashier. The assignor knowing that Schuyler was the cashier of a certain bank and being also at the time indebted to the bank as surety on his mother's note. The assignor was indebted to Schuyler, and at the time the indebtedness was incurred he stated to Schuyler that he owned a certain section of land and that Schuyler should lose nothing. The assignment of such land was drawn up in the bank by Schuyler, and given to a notary with instructions to go to the assignor's place and get it signed and acknowledged. The assignor stated to the notary that he would not sign it if it was for the bank, as he did not wish to get his property mixed up in his mother's affairs. The notary told him that Schuyler said that he (the assignor) would know what it was for. The assignor replied that he would sign it for Schuyler, but would not sign it for the bank. Thereupon it was signed and delivered to the notary. *Held*, that conceding a presumption arose that the assignment was to the bank because of the addition of the word cashier, such presumption was one of fact and was rebutted by the evidence. Anheier v. Signor, 499.

BANKS AND BANKING.—Continued.

The cashier of a state bank organized under chapter 23 of the Laws of 1890, has no authority to borrow money, unless it is specially given by the board of directors. First Nat. Bank v. Michigan City Bank, 608.

One who seeks to charge a banking corporation organized under the state banking law upon a loan made by one of its members must show that such officer had express authority from the directors to make the loan, or that it was ratified by them. First Nat. Bank v. Michigan City Bank, 608.

The plaintiff by suing to recover the amount due upon four notes, admitted to be forgeries as to the makers, which notes it rediscounted for the defendant in reliance upon the latter's promise to pay plaintiff the amounts they called for when they became due. Plaintiff dealt with defendant's cashier only. *Held*, that the transaction was a loan, and that inasmuch as it does not appear that the cashier was authorized to make such loan by the directors of the defendant bank, or that his acts were ratified by them, the defendant is not liable therefor. First Nat. Bank v. Michigan City Bank, 608.

One who, after learning of the worthlessness of a check, pays to the bank which discounted it half its amount which had been paid to her by the payee, who owned the other half interest, on her agreement to repay him if the check proved worthless, cannot recover it back from the bank, where she paid it with the consent of the payee who was liable to the bank on his indorsement for the full amount of the check. Krump v. First State Bank, 75.

Bank stock pledged is subject to attachment against the pledgor. Second National Bank v. First National Bank, 50.

BASTARDS.

Chapter 8 of the Civil Code, relating to the adoption by adult persons of minor children other than their own by procedure therein provided, requires that the persons adopting be inhabitants of the state. Section 2806 of this chapter, which provides for the adoption of an illegitimate child by its father by acts and conduct, construed, and *held*, that the adoption in law which results from the adoption in fact, is the same in legal effect as that resulting from the adoption by decree of court. Further, that the adopting parent must be domiciled within the state when the act of adoption occurs. Eddie v. Eddie, 376.

Where both the father, mother, and their illegitimate children were domiciled in a foreign kingdom, whose laws made no provision for the adoption of illegitimate children by their father, such as exists in this state, the conduct of the father toward them in recognizing them as his own children, treating them as such, and contributing to their support, all occurring in the foreign state, and entirely discontinued after leaving the foreign country and coming into this jurisdiction, does not constitute an adoption under the laws of this state. Eddie v. Eddie, 376.

An illegitimate child, under Sec. 3744, Rev. Codes, may inherit from its father when the father has acknowledged him as his child by an instrument in writing properly witnessed, but then only from his father directly, and not the estates of his lineal or collateral kindred,—and then as an illegitimate child. But, under the same section, if the legal relation of parent and child has been established by an adoption under Sec. 2806, Rev. Codes, he is clothed with the full rights of inheritance of a legitimate child. Eddie v. Eddie, 376.

BILL OF EXCEPTIONS. See STATEMENT OF CASE, 83.

BILLS AND NOTES. See NEGOTIABLE INSTRUMENTS, 108, 111, 432.

BOARD OF AUDIT. See MUNICIPAL CORPORATIONS, 69.

BOUNDARIES.

In cases of disputed boundary the points marked by the original stakes and monuments placed by the government surveyors, if they can be found, or the places where they were identified, govern, Radford v. Johnson, 182.

Bounds and starting points are questions of fact to be determined by evidence as in other cases. Radford v. Johnson, 182.

The presumption of accuracy given to surveys of a county surveyor by section 2028, Rev. Codes, refers to surveys made in conformity to that and succeeding sections, and to his measurements and computations and such other acts as are done pursuant to an exact science, or as are expressly provided for by statute, including field notes and plats, but does not extend to a determination of the disputed starting points or boundaries. Radford v. Johnson, 182.

BRIEFS. See APPEAL AND ERROR, 590, 96; COURT RULES, 590.

BROKERS. See FACTORS AND BROKERS, 461.

BUILDING AND LOAN ASSOCIATIONS.

Although a by-law of a building and loan association fixes a minimum premium below which bids will not be considered, may render a transaction usurious as to a member who was forced, by reason of such by-law, to bid a larger premium than he would otherwise have been required to pay; a member who voluntarily bid a premium greatly in excess of that required by the by-law, cannot complain of the same. U. S. Sav. & L. Co. v. Shain, 136.

A subscriber for shares of stock in a building and loan association who agrees to pay therefor, by paying monthly installments on each share until it reaches maturity, and subsequently borrowed money from the association with the understanding that the same may be paid by surrender and cancellation of his stock when it reaches maturity, until which time such stock is to share in the profits of the association, cannot claim that his monthly payments on stock shall be applied, when made, in reduction of the amount borrowed. U. S. Sav. & Loan Co. v. Shain, 136.

Courts cannot presume that a building and loan association violated its charter provisions as well as the provisions of the statute under which it was created, by refusing to allow its members to secure its funds by competative bidding for the same without some competent evidence of such a course. U. S. Sav. & L. Co. v. Shain, 136.

A member of a building and loan association, who borrows money from the association, and bids a premium for the privilege of obtaining the loan, and executes his bond for the amount of the loan and premium, giving a mortgage to secure the payment of the bond, and at the same time assigns to such association his shares of stock as collateral security for such payment, is not entitled in an action brought to foreclose such mortgage by the receiver of such association (said association being insolvent), to apply the amounts he has paid as dues upon his stock in reduction of his indebtedness. Hale v. Cairns, 145.

BURDEN OF PROOF. See EVIDENCE, 136, 124, 153, 333.

A member and borrower of money from a building and loan association has the burden to show that he did not secure its funds by competative bid for the same. United States Sav. & L. Ass'n v. Shain, 136.

A person who suffered death by railroad accident of which there was no eye witness, will be presumed to have been in the exercise of due care at the time, until the contrary is made to appear by the evidence. Cameron v. Great Northern Ry. Co., 124.

In an action against the buyer by the seller of goods of the value of fifty dollars and upwards for the agreed price, the burden of proof is on the seller to show the contract of sale and that the goods contracted to be sold were received and accepted by the buyer under the contract. Dinnie v. Johnson, 153.

BURGLARY. See CRIMINAL LAW.

The boring into a granary with an auger, with intent to steal the wheat which thereby escapes through the hole, is sufficient breaking and entering to sustain a conviction for burglary in the third degree. State v. Crawford, 539.

In cases of burglary where one and the same instrument is used both for the purpose of breaking and for the purpose of committing an ulterior crime within the building, it will suffice to show an entry by showing that the instrument so used was thrust into the building and was used in committing the ulterior offense, without showing that the accused entered the building in person. State v. Crawford, 539.

The defendant was informed against for burglary in the third degree. The evidence discloses that in the night time he bored three holes with a two-inch auger through the walls of a granary and into a mass of wheat stored therein. The weight of the grain forced several bushels of wheat to pass out of the aperture caused by the auger, which wheat was taken away and sold by the defendant. *Held*, upon this evidence, that it was error for the court to direct a verdict of acquittal. State v. Crawford, 539.

Where a defendant broke and entered a granary by means of auger holes bored into the same so that wheat escaped, which was by him stolen and carried away, it was *held* that the intent to steal within the granary was sufficiently shown by the fact that the wheat was by defendant's agency transferred from the inside to the outside of the granary. State v. Crawford, 539.

CANCELLATION OF INSTRUMENTS.

Evidence examined and held sufficient to justify the cancellation of a deed from aged parents to their child, procured through fraud and undue influence. Brummond v. Krause, 573.

CARE. See NEGLIGENCE, 124.

CARRIERS. See RAILROADS, 23, 124; NEGLIGENCE, 23, 124, 604.

Carrier *held* liable in damages for expelling intoxicated passenger from station on a stormy night, whereby he died from exposure. Haug v. Great Northern Ry. Co., 23.

CERTIFICATE OF COURT. See STATEMENT OF CASE, 578, 83; APPEAL AND ERROR, 578-83.

CHALLENGES. See JURORS, 559.

CHANGE OF VENUE. See JUSTICE OF THE PEACE, 226.

CHATTEL MORTGAGES. See CLAIM AND DELIVERY, 44.

A chattel mortgagee, upon default in the payment of his mortgage debt, may maintain an action of claim and delivery for the recovery of the property described in his mortgage, providing he has first demanded possession of the property, and possession has been refused. James v. Wilson, 186.

A chattel mortgage does not transfer title, nor does it confer the absolute right of possession upon the mortgagee, after condition broken. Until default, and possession is demanded by the mortgagee, it is a mere lien. James v. Wilson, 186.

A second mortgagee may maintain an action against the first mortgagee for the conversion by the latter of personal property included in both mortgages. The measure of recovery in such case is the value of the property converted, less the amount due upon the first mortgage. Clendening v. Hawk, 419.

In an action by a second mortgagee against a first mortgagee for the conversion by the latter of property covered by both mortgages, where it appeared that the value of the property converted exceeded the amount due on the first mortgage lien, *held*, that it was error to direct a verdict for the defendant. Clendening v. Hawk, 419.

A mortgagee is disqualified from being one of the two witnesses to a chattel mortgage required by section 4738, Rev. Codes, by reason of being an immediate party to the instrument. Donovan v. St. Anthony & Dakota Elevator Co., 585.

The filing of a chattel mortgage which is witnessed only by the mortgagee and one other person does not operate to give constructive notice of its existence. Donovan v. St. Anthony & Dakota Elevator Co., 585.

Where, after the execution of a chattel mortgage upon a stock of merchandise, the parties thereto entered into an oral agreement whereby the mortgagor, as a part of the expense incident to selling the goods at retail, is to retain a stipulated salary, not excessive in amount, as expense for selling the goods at retail, *held*, that such oral agreement is to be construed with and as a part of the mortgage. Red River Valley Nat. Bank v. Barnes, 432.

Where a chattel mortgage upon a stock of merchandise in terms provided that the mortgagor should remain in possession and sell the mortgaged property and account for the sales to the mortgagee the mortgage was not fraudulent in law as embodying a secret trust for the benefit of the debtor. In such cases the crucial question is whether the arrangement entered into is honestly made to secure the payment of an actual indebtedness, secured by the mortgage, or whether, on the contrary, it is a mere shift or device to shield the debtor's property from attack by other creditors, while it enables the debtor to proceed with his business for his own advantage. Red River Valley Nat. Bank v. Barnes, 432.

CITIES. See MUNICIPAL CORPORATIONS, 69-565.

The word "city" as used in § 1, Ch. 143, Laws 1899, does not include incorporated towns and villages. Plummer v. Borsheim, 565.

CITY NEGLIGENCE. See MUNICIPAL CORPORATIONS, 534; NEGLIGENCE, 534.

CLAIM AND DELIVERY. See EXEMPTIONS, 590.

In an action of claim and delivery for the unlawful detention of chattels, the defendant under a general denial may show a right of possession superior to that of the plaintiff, either in himself or another; but such right of possession must be an absolute right and not dependent on conditions. James v. Wilson, 186.

In claim and delivery by a second mortgagee against the mortgagor for the possession of chattels covered by the mortgage, the mortgagor cannot show in his own defense that there is a prior outstanding and unpaid chattel mortgage upon the same property described in the plaintiff's mortgage, there being no evidence that the owner of the prior mortgage ever demanded possession of the property. James v. Wilson, 186.

In claim and delivery for the recovery of grain grown upon land in possession of the defendant, where the plaintiff's right to possession is based upon a written contract, it is competent for the defendant to show that the contract never, in fact, went into effect. Lane v. O'Toole, 210.

In an action against a warehouseman to recover the value of grain stored, an allegation in the complaint that the plaintiff was the owner and entitled to the possession of said grain, and a prayer that plaintiff recover a like quantity, quality and kind of grain, or the value thereof, do not constitute the action only in replevin. Marshall v. Andrews & Gage, 364.

Where an officer refuses to turn over exempt personal property seized by him under warrant of attachment, an action of claim and delivery will lie against him and his bondsmen therefor. Oliver v. Wilson, 590.

One Thomas O'Toole placed in an elevator 965 bushels of No. 1 northern wheat, and took a storage ticket therefor. Subsequently O'Toole sold a portion of the wheat represented by the storage ticket, and received in payment a check upon the First Bank of Crystal, payable to defendant's order, which check was delivered to the defendant, and was subsequently presented by the defendant to the bank upon which it was drawn and paid and the amount of the check credited by the defendant on O'Toole's indebtedness to the defendant. Plaintiff seeks to recover the amount of his check as the owner of the wheat originally deposited under a farm contract. *Held*, that the action cannot be sustained. Omlie v. Farmers' State Bank, 570.

A judgment in claim and delivery is conclusive upon both parties thereto as to the right of possession of the property in dispute and the value thereof, and the damages to which the successful party is entitled to the date of the verdict or decision. Paulson v. Nichols & Shepard Co., 606.

The successful party in claim and delivery may refuse to receive the property in dispute when tendered in satisfaction of the judgment for value, and at the same time bring an action to recover damages to said property, whether accruing before or after the date of judgment in claim and delivery. Paulson v. Nichols & Shepard Co., 606.

CLAIM AND DELIVERY—Continued.

Where mortgaged wheat was delivered to an elevator and general storage tickets issued therefor permitting the owner to demand wheat of the same quality and quantity as that delivered to the elevator, but not to demand the identical wheat delivered, an assignee of the storage tickets has no such possession of the mortgaged wheat as will entitle the mortgagee to maintain replevin against him. Best v. Muir, 44; Best v. Barrett, 49.

The owner of mortgaged wheat delivered the same to an elevator, and turned over to defendant, in payment of a claim, the tickets issued by the elevator company. They were general storage, and not special bin tickets. *Held*, that defendant had no control over the identical wheat covered by the mortgage, or over the mass with which it was mingled, but could only claim from the elevator company delivery to him of the number of bushels named in the ticket, of the grade therein specified, without reference to the source from which the company should obtain the grain for delivery. And therefore *held*, that the mortgagee could not maintain replevin against the defendant for the mortgaged wheat, he being neither in the actual nor in the constructive possession thereof.

COLLATERAL SECURITY. See PLEDGES, 50; NEGOTIABLE INSTRUMENTS, 432.

COMMERCIAL PAPER. See NEGOTIABLE INSTRUMENTS, 382.

COMMITTING MAGISTRATE. See CRIMINAL LAW, 548.

COMMITMENT. See CRIMINAL LAW, 548.

COMPROMISE AND SETTLEMENT. See ACCOUNT STATED, 603.

CONDEMNATION PROCEEDINGS. See EMINENT DOMAIN.

CONDITIONAL SALES. See SALES, 243.

CONFLICT OF LAWS. See EVIDENCE, 136; SUCCESSION, 376.

Where in a money loaning transaction, the lender and the borrower reside in different states, it is competent for them to agree that the transaction shall be governed by the laws of either state. U. S. Sav. & L. Co. v. Shain, 136; Hale v. Cairns, 145.

Where both the personal and real property of an intestate is situated within this state, which is also his domicile at the time of his death, the laws of this state govern the descent and distribution thereof, following the rule that the descent of personal property is governed by the law of the domicile of the owner, and real property by the law of the place where situated. Eddie v. Eddie, 376.

Chapter 8 of the Civil Code, relating to the adoption by adult persons of minor children other than their own by the procedure therein provided, requires that the persons adopting be inhabitants of the state. Section 2806 of this chapter, which provides for the adoption of an illegitimate child by its father by acts and conduct, construed, and *held*, that the adoption in law which results from the adoption in fact, is the same in legal effect as that resulting from an adoption by decree of court. Further, that the adopting parent must be domiciled within the state when the act of adoption occurs. Where both the father, mother, and their illegitimate children were domiciled in a foreign kingdom, whose laws made no provision for the adoption of illegitimate children by their father, such as exists in this state,

CONFLICT OF LAWS—Continued.

the conduct of the father toward them in recognizing them as his own children, treating them as such, and contributing to their support, all occuring in the foreign state, and entirely discontinued after leaving the foreign country and coming into this jurisdiction, do not constitute an adoption under the laws of this state. Eddie v. Eddie, 376.

The right of an illegitimate child to inherit from its father is given by section 3744, Rev. Codes, found in the chapter on succession. Under this section he may inherit when the father has acknowledged him as his child by an instrument in writing, properly witnessed, but then only from his father directly, and not the estate of his lineal or collateral kindred,—and then as an illegitimate child. But, under the same section, if the legal relation of parent and child has been established by an adoption under section 2806, Rev. Codes, he is clothed with the full rights of inheritance of a legitimate child. Eddie v. Eddie, 376.

The validity and interpretation of a will bequeathing a mortgage upon land in this state, must be governed by the laws of the testator's domicile, since such a mortgage is personal property under §§ 4699-4700, Rev. Codes. Crandell v. Barker, 263; Knox v. Barker, 272.

CONSIDERATION. See INTOXICATING LIQUORS, 111; CONTRACTS, 474, 121; NEGOTIABLE INSTRUMENTS, 432.

Intoxicating liquors sold in violation of the prohibition law is not a sufficient consideration to sustain a recovery upon a promissory note given as the purchase price thereof. Oswald & Co. v. Moran, 111.

The relinquishment of a timber-culture entry, which carries with it certain valuable improvements, made for the benefit of another person, and that he might file a homestead entry thereon, all under mutual agreement, is a sufficient consideration for the latter's promise that the former might crop the land. Peoples v. Evans, 121.

A lease which is void under the statute of frauds, by reason of being for a period of more than one year, nevertheless governs the rights and relations of the parties so far as executed. Peoples v. Evans, 121.

CONSTITUTIONAL LAW.

The proviso found in Sec. 1, Ch. 143, Laws 1899, violates Sec. 11 of the state constitution, which requires all general laws to have a uniform operation, in that it applies only to school townships which include a city of 800 inhabitants or more. Plummer v. Borsheim, 565.

Section 84, Ch. 132, Laws 1890, is not in conflict with section 61 of the state constitution. The provisions of said act are germane to the subject of the act as expressed in its title. Paine v. Dickey County, 581.

Chapter 126, Laws of 1897, construed with reference to its title. The title of Chapter 126, Laws of 1897, after eliminating its repealing features, reads as follows: "An act prescribing the mode of making assessments of property, the equalization of and the levy and collection of taxes, and for all other purposes relative thereto." *Held*: First, that the subject of the enactment as stated in its title is that of taxation for the public revenues, and that also; second, that the words, "and for all other purposes relative thereto," do not enlarge the subject of the statute. Divet v. Richland County, 65.

Section 88 of said chapter examined, and, in so far as the same authorizes the recovery of taxes paid into the county treasury prior to the passage of the act, upon land exempt from taxation, *held*, that the

CONSTITUTIONAL LAW—Continued.

section is unconstitutional under the provision of section 61 of the state constitution, in this: that the right to recover taxes paid into the county treasury for the use of private persons by actions is a matter wholly foreign to the subject and purposes of the act as the same are set out in its title. Divet v. Richland County, 65.

While it is competent for the legislature to regulate and reasonably restrict the privileges of habeas corpus, it cannot wholly deprive the Supreme Court, in the exercise of its original jurisdiction, of its constitutional right to issue the writ. Carruth v. Taylor, 166.

An act of the Sixth legislative assembly, Ch. 118, Laws 1899, entitled "An act taxing the occupation of hawking and peddling, and regulating the licensing of persons engaged in such occupation," construed, and *held*, to be a measure intended to produce revenue by taxing the occupation of peddling; and *held*, further, that the same was also intended as a police measure to regulate such occupation. State v. Klectzen, 286.

A statute nowhere states or indicates the object or purpose of the tax, nor does it declare how the revenue to be derived thereunder is to be applied. Accordingly, *held*, that the act is repugnant to the provisions of section 175 of the state constitution, and therefore void. State v. Klectzen, 286.

The statute, Ch. 118, Laws 1899, cannot be sustained as a measure of police regulation after the revenue features of the act are eliminated. State v. Klectzen, 286.

Chapter 25, Laws 1895, is entitled, "An act to increase the revenues of the state by changing and increasing the boundaries of the counties of Billings, Stark, and Mercer." The body of the act simply increases the boundaries of such counties. *Held*, that the act is unconstitutional, because the subject of the act is not expressed in the title, as required by section 61 of the constitution of this state. Richard v. Stark County, 392.

Section 524, Rev. Codes, which provides that in the canvass of votes any ballot which is not indorsed as provided in this chapter by the official stamp and initials shall be void and shall not be counted, is a valid enactment and not repugnant to the constitution. Miller v. Schallern, 395.

The statutory assurances given to the purchaser at a tax sale cannot be affected by a subsequent statute without impairing the obligation of the contract. Roberts v. First Nat. Bank, 504.

CONSTRUCTION OF STATUTES. See STATUTES, 113-111.

CONTEMPTS, 30.

A sum decreed to be paid by a husband in pursuance of his stipulation for the support of the wife, in an action in which he obtained a divorce, is not alimony, but is in effect a money judgment on contract, the payment of which cannot be enforced by an attachment for contempt. Glynn v. Glynn, 233.

CONTINUANCE AND ADJOURNMENT.

A continuance asked under Sec. 6650, Rev. Codes, for the purpose of taking the deposition of the plaintiff, who was a non-resident should not be granted in the absence of a showing of deligence. Benoit v. Revoir, 226.

CONTRACTS. See RATIFICATION, 608; ULTRA VIRES, 608; LANDLORD AND TENENT, 419, 121; STATUTE OF FRAUDS, 153; VENDOR AND PURCHASER, 306.

The relinquishment of a timber culture entry to enable another person to file a homestead entry, is a sufficient consideration to support an agreement that the relinquishing party might continue to crop the land where the latter had placed valuable improvements upon the property. Peoples v. Evans, 121.

The mere delivery of goods under an oral agreement within the statute of frauds will not validate the contract, but there must be a voluntary receipt and acceptance of the property on the part of the buyer. Dinnie v. Johnson, 153.

A contractor who has substantially performed a building contract, saving innocent and unintentional deviations and omissions capable of being remedied, may recover the agreed price, less the expense of repairing the defects and omissions; but is not entitled to payment where he intentionally deviated from the contract in important particulars not easily remedied. Anderson v. Todd, 158.

In a contract of sale of real property it was provided that payment should be made by delivering to the vendor, in an elevator, the one-half of all grain raised on the premises each year, and that until such delivery the title to the entire crop should remain in the vendor. *Held*, nevertheless, that while the contract remained in force the vendee was entitled to the possession of said crop for the purpose of threshing and preparing it for delivery as specified in the contract. Boyum v. Johnson, 306.

Where, in a contract, it was provided that default in the performance of any of the covenants therein contained should at the election of the vendor, render such contract void, and there was a default in the covenant to pay taxes, and after such default the vendee, with the knowledge of the vendor, proceeded to expend labor and money in planting and producing a crop upon said land, *held*, that after such crop was produced, it was too late for the vendor for the first time to give notice of his election to declare the contract void by reason of such default, and thereby secure the entire crop. Under such circumstances the law conclusively presumes that the default was waived. Boyum v. Johnson, 306.

The title and interest of a tenant in grain produced by him upon land cultivated under a written lease from the owner of the land, which has not been abrogated or suspended, is to be determined by the terms of such lease. Clendening v. Hawk, 419.

When a tenant, during the life of the lease, enters into a written contract with a third person, who assumes to act therein as agent for the owner, but is not so in fact, whereby the tenant is to receive a fixed compensation in money, instead of a share of the crop, such contract, not being authorized or ratified by the landlord, does not alter or supersede the original lease. Clendening v. Hawk, 419.

A judgment was a first lien on land. In negotiating for a mortgage loan, the mortgagee insisted that the mortgage should state that there were no other liens on the property, and promised that if the judgment should ever come up he would take care of it. The mortgagee bought and took an assignment of the judgment, and the mortgagor has been caused no trouble by reason of the fact that the mortgage was not given in the form which he desired; i. e., showing that the judgment was a first lien, *held*, that the mortgagor suffered or

CONTRACTS—Continued.

agreed to suffer no prejudice which would furnish a consideration for the alleged promise to take care of the judgment. Roberts v. First Nat. Bank, 474.

The promise of a creditor to his debtor, made at the time of a partial payment by the latter, that he will take care of a certain judgment against the latter in favor of a third person, is without consideration, so far as it is dependent on such payment. Roberts v. First Nat. Bank, 474.

A purchase at a tax sale is a contract. It is made upon the statutory assurances then given to the purchaser, and no subsequent statute can sweep away these assurances without impairing the obligation of the contract. Roberts v. First Nat. Bank, 504.

A statute declared that no member of the city council should be interested in any contract entered into by the city. *Held*, that a violation of the provision would not defeat a tax levy for the purpose of making payments under the contract. Roberts v. First Nat. Bank, 504.

CONTRIBUTORY NEGLIGENCE. See NEGLIGENCE, 124, 333, 613.

CONVERSION. See TROVER AND CONVERSION, 570, 200, 210; CLAIM AND DELIVERY, 210.

The owner of wheat delivered by another to an elevator company is entitled, after proper demand and refusal by the company to deliver the grain, to maintain an action for its conversion; but cannot recover its value where no evidence is given as to the price of the wheat at the time of the demand. Towne v. Elevator Company, 200.

An elevator company which received wheat and issued storage tickets to the person delivering it, who appropriated the proceeds, is not liable in an action for conversion brought by a third person, entitled under an unrecorded contract with the person delivering the grain, and of which the company had no notice, to one-half of the wheat. Towne v. Elevator Company, 200.

A demand is an essential prerequisite to an action to recover property in specie, or its value, where it is in the possession of an innocent bailee without notice of plaintiff's rights. Towne v. Elevator Company, 200.

In an action by the owner of chattels against an innocent bailee for conversion, evidence of the shipment of the property out of the state is not sufficient evidence of conversion of itself to justify a recovery. Towne v. Elevator Company, 200.

In an action to recover a gross sum for value of the use of a hack and team wrongfully detained by the defendant, and for a fixed period, it is not necessary to plead specially unusual conditions, which make the value of the use greater upon some days than others, to render evidence of such greater value admissible, when the conditions are equally within the knowledge of both parties. Hill v. Wilson, 309.

Evidence as to the value of the use of personal property upon particular occasions which create an unusual demand for that kind of property is not subject to the objection that it is speculative, when the evidence is based upon known conditions of demand and value existing at the time. Hill v. Wilson, 309.

In an action by the vendor of personal property to recover in conversion where plaintiff's ownership is evidenced by certain condi-

CONVERSION.—Continued.

tional sale notes, the defense of waiver of title is for the jury. Warnken v. Langdon Mer. Co., 243.

Action for the conversion of wheat. Plaintiff had a chattel mortgage upon a crop of wheat. The mortgagor, after threshing the wheat, placed the same in elevators, and received the usual storage tickets therefor. Subsequently the mortgagor delivered the tickets to the defendant as collateral to a seed lien held by defendant against the mortgagor. Defendant did not have anything to do with placing the grain in the elevators, and never had the actual possession of the wheat. Prior to commencing the action, plaintiff demanded of defendant the wheat, or its proceeds, and the demand was not complied with. Upon such facts the trial court instructed the jury to the effect that the defendant, by virtue of the storage tickets held by him, had constructive possession of the grain, and that his refusal to comply with the demand operated as a conversion of the wheat, and, consequently, that an action would lie for such conversion. *Held*, that the instruction was error. The tickets did not entitle the defendant to demand or receive possession of any particular wheat, much less to the identical wheat upon which the plaintiff had a lien. See Best v. Muir, 8 N. D. 44, 77 N. W. Rep. 95. Plano Mfg. Co. v. Jones, 315.

A refusal by a public warehouseman to return grain stored, or to pay for it, is, prima facie, a conversion of the grain. Marshall v. Andrews & Gage, 364.

In an action against a warehouseman for refusal to deliver grain stored, where defendants allege that the warehouse was burned, with its contents, that plaintiff's grain was contained therein, and the reply admitted the burning, but denied that plaintiff's grain was contained therein, the burden was on defendants to establish that plaintiff's grain was destroyed as alleged. Marshall v. Andrews & Gage, 364.

To entitle one to maintain an action for the conversion of personal property, he must show that at the time of the alleged conversion he had possession or a legal right to the immediate possession, and a general or special ownership in the property converted. Clendening v. Hawk, 419.

A second mortgagee may maintain an action against the first mortgagee for the conversion by the latter of the personal property included in both mortgages. The measure of recovery in such case is the value of the property converted, less the amount due upon the first mortgage. Clendening v. Hawk, 419.

In an action by a second mortgagee against a first mortgagee for the conversion by the latter of property, where it appeared that the value of the property converted exceeded the amount due upon the first mortgage lien, it was *held* error to direct a verdict for the defendant. Clendening v. Hawk, 419.

Subdivision 2, § 5000, Rev. Codes, permits a recovery in conversion by the injured party of the highest market value of the property converted, at any time between the conversion and the verdict, where he has prosecuted his action with reasonable diligence. *Held*, as matter of law, under the facts of the case, which show an unexplained delay of eleven months in commencing its action, that plaintiff has not prosecuted its action with reasonable diligence, and cannot, therefore, recover the highest market price. First Nat. Bank v. M. & N. Elev. Co., 430.

CONVERSION.—Continued.

In trover the plaintiff must recover on the strength of his own title and not upon the weakness of his adversaries'. In this case the plaintiff was not the owner of the wheat in question and hence could not recover for its conversion. Omlie v. Farmers' State Bank, 570.

CORPORATIONS. See BUILDING AND LOAN ASSOCIATIONS, 136, 145; BANKS AND BANKING, 608.

The authority of the secretary of a corporation to execute an assignment of tax sale certificate running to the corporation, need not affirmatively appear to sustain the assignment. Meldahl v. Dobbin, 118.

A note and mortgage executed by a member of a building and loan association residing in one state to the association domiciled in another, may be enforced in the courts of the former state, although the association has not complied with a statute prescribing the terms on which foreign corporations may do business within the state. U. S. Sav. & L. Co. v. Shain, 136.

A cashier of a state bank has no authority to borrow money unless it is especially given by the board of directors. First Nat. Bank v. Michigan City Bank, 608.

CORRECTION OF RECORD. See APPEAL AND ERROR, 319.

COSTS. See JUSTICE OF THE PEACE, 226.

Where, by consent of parties, a non-resident plaintiff in Justice's Court deposited with the court an agreed sum of money in lieu of security for costs, the defendant is not entitled thereafter, and upon a change of venue to another justice, to demand other security for costs. Benoit v. Revoir, 226.

Chapter 38, Session Laws 1897, construed. *Held*, that in cases within the statute either party to an appeal may, at his option, print his abstract and brief, but cannot be required to do so by this court. *Held*, further, that disbursements incurred by such printing are not necessarily incurred in presenting a case to this Court for review, and hence such disbursements are not taxable in favor of the successful party, and the same cannot lawfully enter into the judgment. Black v. Minneapolis & Northern Elev. Co., 96; Ingwaldson v. Skrivseth, 544.

COUNTERCLAIM. See PLEADING, 111, 77, 105; JUDGMENTS, 87; WAIVER, 77-105.

Where the defendant counterclaimed in an action upon a promissory note for moneys illegally paid to plaintiff for intoxicating liquors, *held*, that the counterclaim did not state a cause of action, no demand being averred. Oswald v. Moran, 111.

In an action under the statute to quiet title, the answer alleged ownership in defendant, and in the prayer for relief asked for affirmative judgment ousting plaintiff from possession of the land and quieting title in defendant. *Held*, that this was new matter constituting a counterclaim and required a reply. Morris v. Ewing, 105.

COUNTIES. See TAXATION, 581; PAUPERS, 241.

Liability of counties for support of paupers determined. St. Luke's Hospital Ass'n v. Grand Forks County, 241.

COUNTIES—Continued.

County warrants are not negotiable and are subject to defenses in the hands of the transferee. Gilman v. Gilby Township, 623.

Where the illegality of taxes is determined in an action between other parties, the statute does not contemplate that the county is to have notice of the pendency of such action, or be made a party thereto. The judgment in such action is prima facie valid, and is conclusive upon the question of the liability of the county, at least until the same is attacked and shown to have been illegally or collusively obtained. Paine v. Dickey County, 581.

COURT RULES. See ASSIGNMENTS OF ERROR, 106.

An assignment of error which states in general terms that a finding of fact is insufficient, without pointing out the particular in which it is insufficient, condemned. Brynjolfson v. Thingvalla, 108.

An assignment that a particular conclusion of law, challenged by appellant is "against law and against the evidence and not based upon a sufficient finding of fact" cannot be considered—such assignment lacks certainty, is not sufficiently specific under Rule 12. Brynjolfson v. Thingvalla, 108.

Assignments of error subjoined to appellant's brief must under the rule of court refer to specifications of error in the abstract. If no such reference is made the assignment may be disregarded. Brynjolfson v. Thingvalla, 108.

The abstracts and briefs filed in this Court were typewritten, and the brief contained no reference to the pages of the abstract. Respondent moved to dismiss the appeal because the abstracts and briefs were not printed, and for said defect in the briefs. These grounds furnish no reason for dismissing an appeal; following State v. McKnight, 7 N. D. 444, 75 N. W. Rep. 790. Motion is denied as to this ground. Oliver v. Wilson, 590.

A rule of the District Court which requires a suitor who desires a transcript of a portion of the stenographic notes of the testimony given in the case, in order to prepare a proposed statement of the case for settlement, to procure and file with the clerk of the court a transcript of the entire testimony in the case, is in violation of statute, and is harsh and oppressive, and cannot stand. Kaeppler v. Pollock, 59.

Chapter 5, Laws 1897, amending Sec. 5630, Rev. Codes, does not require that the evidence offered at the trial shall be reduced to narrative form or otherwise pruned of its superflous matter. But this enactment does not annul the rule of court requiring the abstract of the record to be an abridgment of the evidence. Farmers' & Merchants' National Bank v. Davis, 83.

The rule of Court requiring abstracts and briefs upon appeal to be printed, cannot prevail against the legislative enactment, Ch. 38, Laws 1897. Hence costs cannot be taxed for the printing of abstracts and briefs upon appeal from judgments for less than three hundred dollars. Black v. Minneapolis & Northern Elev. Co., 96; Ingwaldson v Skrivseth, 544.

In jury cases the statement of the case will be disregarded notwithstanding it was settled by the trial court on stipulation of counsel, if it violates Rule 13 as to the condensation of the evidence. McTavish v. Great Northern Ry. Co., 94.

CRIMINAL LAW. See INTOXICATING LIQUORS, 559-548; JURIES, 559; RAPE, 311-563; BURGLARY, 539; LARCENY, 292.

The defendant, as for a defense, offered to show his intoxicated condition at and just prior to the commission of the alleged larceny, as bearing upon the existence of the intent. *Held*, that the rejection of the evidence was error. State v. Koerner, 292.

Section 6815, Rev. Codes, which provides that the intoxication of one accused of crime may be considered by the jury in determining the particular purpose, motive, or intent with which the acts were committed, when such purpose, motive, or intent is necessary to constitute a particular species or degree of crime, construed, and *held*, that larceny, which is a crime requiring the existence of the specific intent to deprive another of the property taken to constitute the crime, is included thereunder, and that the intoxicated condition of the defendant may be shown, to be considered by the jury for the purpose of determining whether this intent actually existed. State v. Koerner, 292.

Voluntary intoxication of a defendant is never to be considered by the jury for the purpose of justifying or excusing the commission of a crime which has in fact been committed. State v. Koerner, 292.

The purpose of the admission of evidence of intoxication is not to justify or excuse the crime, but to aid the jury in determining whether, in fact, the crime has been committed. State v. Koerner, 292.

A violation of the provisions of section 3124, Rev. Codes, forbidding any agent to act for any insurance company in transacting the business of insurance without procuring a certificate of authority as therein specified, is a crime under the laws of this state. State v. Hogan, 301.

Whether upon a trial for rape it is competent for the defendant to introduce evidence as to his general reputation for chastity query? Kinneberg v. Kinneberg, 311.

Where, in a prosecution under the prohibition law, the evidence tended to show the sale and keeping for sale of beer, it was proper for the court to instruct the jury that beer was a malt liquor, and intoxicating, and that, if defendant claimed the beer he sold or kept on sale was not intoxicating, the burden was upon him to so show. State v. Currie, 545.

Where the court at two different places in the charge fully explained the matter of reasonable doubt, an instruction in the following language was not misleading, viz: "That is all there is in this case, gentlemen of the jury. If you believe from the evidence in this case that the defendant is not guilty, that he has not kept this place, that he has not sold this liquor, then it is your duty under your oaths as jurors to find this defendant not guilty. It is equally your duty if you believe this defendant to be guilty to say so by your verdict." State v. Currie, 545.

A complaint filed with a committing magistrate charging the crime of keeping and maintaining a common nuisance, fixed the locus as in a certain frame building situate on the townsite of Pisek in the proper county and state. The accused waived an examination and was bound over to the District Court. An information was filed against him in that court which he moved to quash, on the ground that he never had or waived a preliminary examination for any criminal offense, because no place was fixed and particularly described in the complaint filed with the magistrate. *Held*, that in the absence of an attack thereon by motion or demurrer the allegation in the

CRIMINAL LAW.—Continued.

complaint was sufficient and that said complaint did state a fixed offense. State v. Rosum, 548.

The statutory requirement that the place be particularly described applies only to cases of search and seizure, or to trials upon indictment or information for keeping and maintaining a common nuisance. It does not extend to a complaint for that offense before a committing magistrate. State v. Rosum, 548.

Where the defendant was charged with keeping and maintaining a common nuisance as a second offense, he moved to squash the information on the ground that he had never had or waived a preliminary examination on the particuliar offense charged in the information. *Held*, that accused, under Sec. 7983, Rev. Codes, may be informed against for any crime covered by the transaction set forth in the complaint, or necessarily connected therewith, or of which the accused knew he must be guilty, if guilty of the matter charged in the complaint. State v. Rosum, 548.

Where a husband knowingly suffers intoxicating liquors to be kept for sale and sold as a beverage in the house in which he lives with his family, or knowingly suffers persons to resort to such house for the purpose of drinking intoxicating liquors contrary to law, he, in law, assents thereto, and is guilty of keeping and maintaining a common nuisance, and the fact that the title to the house may be in the wife, and that she furnishes and sells the intoxicating liquors, will not relieve him of guilt. State v. Rosum, 548.

Section 7601, Rev. Codes, requires that where a state's attorney makes complaint of the violation of the prohibition law verified on information and belief, he must file with the magistrate the deposition of some witness on which such information is based, such statute is sufficiently complied with where the deposition was attached to the complaint when handed to the magistrate, though it was not marked filed. State v. Rosum, 548.

Section 7966, Rev. Codes, requires a committing magistrate to indorse his order of committment on the complaint. But where the order of comittment was entered upon the docket and a copy thereof returned to the District Court, the statute is sufficiently complied with. It is the making of the order that gives the District Court jurisdiction and not the place of its entry. State v. Rosum, 548.

Threats made for the purpose of destroying or withholding evidence raise a presumption that such evidence is detrimental to the party seeking to destroy or withhold it, and such threats may be given in evidence. State v. Rosum, 548.

Where a defendant in a criminal case voluntarily goes upon the witness stand in his own behalf, he is, on cross-examination, subject to the same rules that govern as to other witnesses and may, as affecting his credibility, be asked as to collateral crimes even if his answers may disgrace him in the eyes of the jury. State v. Rosum, 549.

Under chapter 39, Laws 1897, the fact that a party called as a juror states on his voir dire that he has an impression concerning the guilt or innocence of the accused, gathered from a general conversation with a person claiming to have some knowledge of the facts, and which it will require evidence to remove, does not disqualify the party as a juror, if it satisfactorily appears to the court that, notwithstanding such impression, the juror can and will, if accepted, fairly and impartially try the case on the testimony adduced and the charge of the court. State v. Ekanger, 559.

CRIMINAL LAW.—Continued.

The defendant, having gone upon the stand in his own behalf, might, on cross-examination, as affecting his credibility, be asked concerning collateral offenses; and, if he claimed immunity on the ground that his answers would tend to criminate him, he himself must make the claim under the sanctity of his oath. State v. Ekanger, 559.

Where the defendant was charged with keeping and maintaining a common nuisance, and the evidence tended to establish that the nuisance was kept in a building in which defendant and his wife resided as their home, and that the lease was in the name of the wife, and that she paid the rent, and kept and sold intoxicating liquors therein with the knowledge and consent of the defendant, it was proper to instruct the jury that, if they found such facts to exist, they should find the defendant guilty. State v. Ekanger, 559.

In this state no conviction for any crime can be had upon the uncorroborated testimony of an accomplice. There must be other testimony tending to connect the defendant with the commission of the offense. State v. Kellar, 563.

The female participant in incestuous intercourse, whose action is voluntary, and uninfluenced by any element of coercion, either by force, fraud, fear, or undue influence, is an accomplice in the crime of incest. State v. Kellar, 563.

Whether or not the female participant in incestuous intercourse is an accomplice in the crime of incest is generally a question of fact for the jury, and this is always the case where her coercion is sought to be shown inferentially. State v. Kellar, 563.

In cases of burglary, where one and the same instrument is used both for the purpose of breaking and for the purpose of committing an ulterior crime within the building, it will suffice to show an entry by showing that the instrument so used was thrust into the building and was used in committing the ulterior offense, without showing that the accused entered the building in person. State v. Crawford, 539.

The defendant was informed against for the crime of burglary in the third degree. The evidence tended to show that the defendant in the night time bored three holes with a two-inch auger through the walls of a granary, and into a mass of wheat stored therein. The weight of the grain forced several bushels of wheat to pass out of the aperture caused by the auger, which wheat, the evidence shows, was taken away and sold by the defendant. Upon this evidence the trial court directed the jury to acquit upon the ground that the evidence failed to show an entry into the granary. *Held*, that the ruling was error. State v. Crawford, 539.

The intent to steal within a granary is sufficiently shown by the fact that the wheat which was stored inside of the granary was by defendant's agency transferred from the inside to the outside of the granary. It is true that the law of gravitation co-operated with the defendant in removing the wheat; but the defendant by his own act set the law in motion upon the inside of the building, and thereby accomplished his criminal purpose. State v. Crawford, 539.

The act of the legislature, Ch. 118, Laws 1899, taxing the occupation of hawking and peddling violates section 175 of the state constitution, therefore defendant cannot be held for its violation. State v. Klectzen, 286.

DAMAGES. See CONVERSION, 200-309; NEGOTIABLE INSTRUMENTS, 382.

Where the agent for the collection of commercial paper is guilty of negligence with respect to such agency, the measure of damages for such negligence is prima facie the amount of the paper, with interest. Commercial Bank v. Red River Valley Nat. Bank, 382.

Where the mortgagor of wheat sold the same into a public elevator, and the elevator company refused to deliver the grain to the mortgagee on demand, this operated as a conversion by the elevator company, but as no evidence was offered as to the value of the wheat at the time of demand no recovery could be had. Towne v. St. Anthony & Dak. Elev. Co., 200.

In an action for damages for the wrongful detention of personal property, it is not necessary to plead specially unusual conditions which makes the value of the use greater upon some days than others, to render evidence of the greater value admissible, when the conditions are equally within the knowledge of both parties. Hill v. Wilson, 309.

The measure of damages to a second mortgagee in an action against the first mortgagee of chattels for the conversion of chattels covered by both mortgages, is the value of the property converted, less the amount due upon the first mortgage. Clendening v. Hawk, 419.

Under Sec. 5000, Subd. 2, Rev. Codes, a plaintiff in conversion can recover the highest market value of the property converted, at any time between the conversion and the verdict, where his action was proscuted with reasonable diligence. An unexplained delay of eleven months in commencing an action is not reasonable diligence within the meaning of this statute. First Nat. Bank v. Minneapolis & Nor. Elev. Co., 430.

In action brought under the statute by a widow to recover damages for the wrongful killing of her husband, where the complaint shows that the deceased left, surviving him, a widow and minor children of tender years, no specific allegations showing that such widow and children suffered pecuniary damages by the loss of such life are required. Haug v. Great Northern Ry. Co., 23.

DEATH BY WRONGFUL ACT. See NEGLIGENCE, 124-613-23; MASTER AND SERVANT, 124-618; DAMAGES, 23.

DEEDS.

The holder of real property under a recorded warranty deed from the grantee in an unrecorded conveyance and also under a recorded quit-claim deed, subsequently executed by the grantor of the unrecorded deed, holds the full, legal and record title to such property. Meldahl v. Dobbin, 115.

A deed absolute on its face, but intended as security only, creates, as between the parties, a mortgage lien only, and a purchaser from the grantee in such deed, while the grantor is in possession of the land, takes with constructive notice of the grantor's rights therein. O'Toole v. Omlie, 444.

The Cass County Bank by deed of special warranty conveyed to one John C. Dalrymple certain real estate in trust for the use and benefit of the children of Oliver C. Dalrymple, which children were also the children and minor heirs of a deceased wife of Oliver C. Dalrymple. By its terms, said deed did not require or authorize John C. Dalrymple as trustee, or otherwise, to do any act or perform any duty, or exercise any power with respect to said real estate, or the title thereto.

DEEDS—Continued.

Held, that said deed did not vest any title or estate whatever in John C. Dalrymple, in trust or otherwise, and that said deed orperated under the statute to convey the whole estate, both legal and equitable. to said minor heirs. Smith v. Security L. & T. Co., 451.

DEMAND. See CONVERSION, 200; ACTION OR SUIT, 111; CLAIM AND DELIVERY, 186.

DEMURRER. See PLEADING, 424; TRIAL, 124.

A motion to dismiss at the close of plaintiff's evidence is tantamount to a demurrer to the evidence, and in such case everything which the jury might reasonably infer from the evidence is to the considered as admitted. Cameron v. Great Northern Ry. Co., 124.

DESCENT AND DISTRIBUTION. See SUCCESSION, 376–263–272.

Where both the personal and real property of an intestate is situated within this state, which is also his domicile at the time of his death, the laws of this state govern the descent and distribution thereof. Eddie v. Eddie, 376.

DETINUE. See CONVERSION, 309.

DISTRICT COURTS.

The District Courts of this state are authorized, under the constitution and laws of the state, to call special terms of the District Court, and to require the attendance of jurors at such terms, as at other terms. State v. Boucher, 277.

The words "at a regular term of the court," contained in Sec. 7755, Rev. Codes, construed to mean a term at which jurors are regularly drawn and summoned, whether such terms are regular or special, with respect to the manner of calling the same. State v. Boucher, 277.

DIVORCE. See HUSBAND AND WIFE, 233.

DOMICILE. See SUCCESSION, 376; BASTARD, 376.

ELECTIONS.

Section 524, Rev. Codes, providing that in the canvass of the votes any ballot which is not indorsed as provided in this chapter by the official stamp and initials shall be void and shall not be counted, is not unconstitutional, because in some instances it might deprive electors of their constitutional right to vote and to have their votes counted. Miller v. Schallern, 395.

Section 524, Rev. Codes, providing that in the canvass of votes any ballot which is not indorsed by the official stamp and initials shall be void and shall not be counted, is mandatory. Miller v. Schallern, 395.

When the name of a person is written or pasted on the official ballot opposite the office to be voted for, it should be counted as a vote for such person for that office, even if there is no mark in the square opposite such name, since Rev. Codes, Sec. 491, as amended by Session Laws 1897, Ch. 76, does not require a cross or mark opposite names which have been written or pasted on the ballot opposite the office to be voted for. Howser v. Pepper, 484.

Where the elector has marked a party square, and the name of a candidate for an office on the opposition ticket, and not the name of the candidate for such office on his party ticket, his intention to vote for the person whose name he has marked, and not for his party candidate, must be followed. Howser v. Pepper, 484.

ELECTIONS—Continued.

Under Rev. Codes, Sec. 491, as amended, which requires a mark in the square at the top of the party ticket, or a "mark or cross" in the square opposite the names of candidates, a ballot which is only marked with a single straight mark in the party square should be counted. Howser v. Pepper, 484.

Where a ballot contains other than legal marks, such marks may be presumed to have been innocently or unintentionally made, and such ballot will be counted, unless it appears from the marks themselves, or by evidence aliunde, that they were intended as distinguishing marks. Howser v. Pepper, 484.

Rev. Codes, Sec. 491, as amended by Sess. Laws 1897, Ch. 76, which provides the methods by which the elector may indicate his choice of candidates, in so far as it relates to marking within the squares, is mandatory; and marks outside the squares are not to be counted or considered for the purpose of gathering the intention of the voter. Howser v. Pepper, 484.

The duty of election inspectors to canvass the votes cast at an election, after rejecting ballots that are declared void, is ministerial, and they have no power to decide questions as to the eligibility of either candidate. Howser v. Pepper, 484.

Where an election for a county office results in two or more persons having an equal number of votes for the same office, neither one of such persons is entitled to be declared elected by the canvassing board until the result of such election is determined by lot, upon the notice and in the manner provided for in Rev. Codes, Sec. 528, relating to the duty of the county auditor in case of tie votes; and a certificate of election issued prior to such determination is void. Howser v. Pepper, 484.

The original ballots cast at an election continue as the best evidence unless it appears that the officers charged with their custody have so kept them that there is a reasonable probability that they have been tampered with. Howser v. Pepper, 484.

Where ballot boxes have not been kept by the person legally charged with their custody, and they have been exposed to the reach of unauthorized persons for a considerable time, the ballots lose their character as the best evidence, and cannot be allowed to impeach the official canvass. Howser v. Pepper, 484.

Rev. Codes, Sec. 566, relating to the trial of election contests, and providing that the judge of the District Court, in case no term of such court occurs in such county within 20 days after the service of the answer in such contest, may appoint a term of such court therein, but, if the term of court occurs in such county before that time, then the contest shall be tried at such term, unless otherwise ordered by the court, and that the District Court, or the judge thereof, may, on ten days' notice by either party, try such contest at chambers, at any placed fixed by the court, was not intended to confine the jurisdiction of the District Court to try election contests to a limited period, but was intended to extend to the parties to election contests speedier methods of bringing the contest to trial. Howser v. Pepper, 484.

The jurisdiction of the District Court to try election contests, when acquired by the service of the notice of contest within the statutory period, continues until such contest is disposed of by trial or dismissed. Howser v. Pepper, 484.

The first Tuesday in March, being the day upon which civil townships

ELECTIONS—Continued.

hold their annual township meetings and elect township officers, is not a legal holiday. State v. Currie, 545.

The duties of the secretary of state in certifying the names of legislative nominees to the auditors of the proper county, under Sec. 504, Rev. Codes, are ministerial and not judicial, and the certification may be compelled by mandamus. State v. Falley, 90.

The secretary of state cannot defend against mandamus to compel his certification of the names of legislature nominees as required by statute, by showing that the nominations were not in fact made in the method required by law. State v. Falley, 90.

If improper nominations have been filed with the secretary of state, the proper remedy of the citizen is by injunction to prevent the certification of the names to the county auditors. State v. Falley, 90.

ELEVATOR COMPANIES. See CONVERSION, 200; WAREHOUSEMEN, 364, 200, 44, 430.

EMINENT DOMAIN.

A civil township that takes or damages private property for public use, must render just compensation therefor to the owner. Township of Noble v. Aasen, 77.

EQUITY. See PLEADING, 413; QUIETING TITLE, 413; PARTNERSHIP, 515; ACCOUNTING, 515; CORPORATIONS, 50.

Equity will not decree a transfer of corporate stock on the corporate books in favor of a pledgee unless he shows a present interest in the stock. Second Nat. Bank v. First Nat. Bank, 50.

It is the province of courts of equity to restrain the unlawful plans and purposes of public officials in cases where the same threaten to dissipate the public funds. Engstad v. Dinnie, 1.

The summary processes provided by statute for the enforcement of taxes are an exclusive remedy. An action in equity in the nature of a suit to foreclose a mortgage does not lie to foreclose a lien upon land created by a tax levy. McHenry v. Kidder County, 413.

A member of a partnership who seeks to avoid a partnership settlement, and to secure a full accounting, must not only show facts which would authorize a court of equity to disregard the settlement, but also produce evidence of such a character that an accounting can be made. In the absence of such evidence, the balance found in the settlement will not be disturbed except as to items which are shown to be erroneous. Lay v. Emery, 515.

In an action for an accounting between partners, where is appears that one of the partners contracted to devote his entire time to the management of the partnership business, and that he has retained from the firm funds compensation for his entire time, when in fact he devoted only a portion of it, a court of equity, upon a final adjustment of the partnership accounts, may make deduction for the value of the portion of his time not so employed. Lay v. Emery, 515.

Where the records of a case show that a case exclusively of equity jurisdiction has been tried as an action at law, and to a jury, this Court will sustain the order of the trial court setting aside the verdict and granting a new trial therein, regardless of the fact that no specific objection was made by either party to such method of trial. Prondzinski v. Garbutt, 191.

EQUITY—Continued.

Where a complaint states that the holder of a sheriff's certificate of sale of real estate by fraud and false promises prevented the owner from redeeming within the statutory period, and, in violation of his oral agreement to extend the period of redemption, took a sheriff's deed, such facts entitle the aggrieved party to relief in equity. Such facts when established, constitute the wrongdoer an involuntary trustee, under section 4263, Rev. Codes. Prondzinski v. Garbutt, 191.

ERROR. See APPEAL AND ERROR.

ESTOPPEL. See WAIVER, 461; LACHES; EVIDENCE, 215.

The owner and holder of a negotiable instrument is not estopped from collecting the same from the maker, who has paid the same to the original payee without inquiry, and when said original payee did not have possession of the note. Stolzman v. Wyman, 108.

One who voluntarily bids a larger premium for a preference or priority of loan from a building association than he is required to bid by the by-law, cannot be heard to complain of the obnoxious by-law because his premium was not paid under coercion of the obnoxious by-law. U. S. Sav. & L. Co. v. Shain, 136.

The law will not allow a party to instist upon and enforce in his own behalf a secret lien upon personal property after he has claimed it unconditionally as his own and has thereby induced another to act in relation to it in some manner effecting his own interest as he would or might not have done if he had been openly and fairly notified of the additional ground of claim. Rosenbaum v. Hayes, 467.

The evidence does not clearly show in this case that the defendant participated in the fruits of the mortgage by receiving a portion of the borrowed money so as to estop him from claiming title to the land. Morris v. Ewing, 99.

That an estoppel in pais should be pleaded is strongly intimated but not decided. Morris v. Ewing, 99.

Payee of a note is not estopped to deny authority of a person to collect the principal because of having collected the interest. Stolzman v. Wyman, 108.

The delay of a resident taxpayer in applying for an injunction to restrain a municipal corporation from completing an ultra vires contract, during which work under the contract was progressing, is not such laches as will constitute an estoppel, where he did not know the facts constituting its illegality before the commencement of the action. Engstad v. Dinnie, 1.

A purchaser at an administrator's sale of realty, the patent to which had been issued to decedent's heirs, under U. S. Rev. Stat., Sec. 2291, when all the facts relating to the title of decedent were matters of record and known to the purchaser and there was no concealment or misrepresentation, cannot, in an action to set aside the deed, set up the doctrine of equitable estoppel against the administrator who petitioned for and made the sale, although he was one of the heirs. Gjerstadengen v. Hartzell, 424.

A tenent in common of land is not estopped by any representations made by his cotenent in obtaining a loan or giving a mortgage on the land, where he had not authorized the latter to either make the loan or execute the mortgage, and was not present at the time. Morris v. Ewing, 99.

ESTOPPEL—Continued.

Indorsee of negotiable note, with interest coupons attached, *held* not estopped where maker paid principal to original payee, while note remains in hands of indorsee, from setting up indorsement or denying agency of payee. Hollinshead v. John Stuart & Co., 35.

Evidence *held* insufficient to show that principal, by accepting proceeds of unauthorized loan made by agent, was estopped to deny its validity. Morris v. Ewing, 99.

EVIDENCE.

S. transferred certain personal property to P. by bill of sale. P., in same manner, transferred the same property to plaintiff. The defendant, as sheriff, and by virtue of a writ of attachment duly issued and placed in his hands for service, seized said property as the property of S. Plaintiff sued the sheriff in conversion. *Held*, that the declarations of S., made after the transfer to plaintiff, tending to defeat plaintiff's title, were improperly received in evidence aginst plaintiff's objections, in the absence of any proof of any combination between S., P., and plaintiff to defraud the creditors of S. Paulson Mercantile Co. v. Seaver, 215.

Where such statements were made by S. in the presence of P., who was the president and general manager of plaintiff, and had possession and control of said property as such, and where such statements were made to an agent of the creditor of S., who subsequently sued out the attachment, that it was the duty of P., as such officer, to contradict such statements if untrue, and his remaining silent constituted an admission of the truth of such statements, and rendered them competent evidence against plaintiff. When, at the same time and under the same circumstances, P. stated to such creditor's agent that S. was owner of said property, such statement became competent evidence against plaintiff. Paulson Mercantile Co. v. Seaver, 215.

Where it was claimed that a transfer was fraudulent and that there had been no change of possession it was proper to exclude the answer to a question, "who was in possession?" as that was a question for the jury. Tetrault v. O'Connor, 15.

Evidences of false pretenses in contracting the debt may be shown to defeat a claim for exemptions. Tetrault v. O'Connor, 15.

In an action upon an indorsement by an indorsee of a check against his immediate indorser, parole evidence is admissible to establish that the indorsement was made pursuant to a prior agreement, under the terms of which the indorser was freed from, and the indorsee assumed, all liability thereon, and that the indorsement was for the sole purpose of transferring title thereto to the indorsee, to enable him to collect it. Dickinson v. Burke, 118.

A written statement that one who puts in a crop, doing so for hire, is not conclusive, but its weight is for the jury, where it is claimed to have been signed merely to aid another in establishing possession and use of the land under his homestead entry. Peoples v. Evans, 121.

A person who suffered death by railroad accident, of which there was no eye witness, will be presumed to have been in the exercise of due care at the time, until the contrary is made to appear by the evidence. Cameron v. Great Northern Ry. Co., 124.

Courts will not presume that a building and loan association violated its charter provisions as well as the provisions of the statute under which it was created, by refusing to allow its members to secure its funds by competative bidding for the same, without some competent evidence that such a course was pursued. U. S. Sav. & L. Co. v. Shain, 136.

EVIDENCE.—Continued.

It will be presumed, in the absence of stipulations where a money-loaning transaction between parties residing in different states would be valid and binding under the laws of one state and invalid under the laws of the other, that the parties contracted with reference to the laws of the state where the contract would be valid. U. S. Sav. & L. Co. v. Shain, 136.

In an action against a buyer by the seller of goods, of the value of fifty dollars and upward, for the agreed price, the burden of proof is on the seller to show the contract of sale and that the goods contracted to be sold were received and accepted by the buyer under the contract. Dinnie v. Johnson, 153.

In an action to recover upon a building contract from which the plaintiff has deviated in important particulars, he cannot show that the work done and material furnished were in fact as good as those the contract called for. Anderson v. Todd, 158.

Where a statute expressly makes the record of an instrument prima facie evidence of the facts therein stated, such record when offered in evidence is not subject to the objection that it is secondary. First M. E. Church v. Fadden, 162.

When a statute changing a rule of evidence has gone into effect, cases thereafter tried must be governed thereby, although the pleadings were filed before the law went into effect. First M. E. Church v. Fadden, 162.

The recital in a sheriff's affidavit of mortgage sale that the party making it is a deputy sheriff, is prima facie evidence of the fact that the party making the sale was deputy sheriff, and no other proof of his official capacity is required until such prima facie case is overcome. First M. E. Church v. Fadden, 162.

Bounds and starting points are questions of fact to be determined by the evidence. Radford v. Johnson, 182.

The presumption of accuracy given to the surveys of county surveyors by section 2028, Rev. Codes, refers to such surveys as are made in conformity to the requirements of that and the succeeding sections. Radford v. Johnson, 182.

A defendant under a general denial in a claim and delivery action may show a superior outstanding title, either in himself or a stranger to the action. James v. Wilson, 186.

In claim and delivery by the second mortgagee of chattels against the mortgagor, the mortgagor cannot in defense show a prior mortgage on the same property in a third person, there being no evidence that the owner of the prior mortgage ever demanded possession of the property in question. James v. Wilson, 186.

A verdict for injury to a team of horses and other property, caused by colliding with an unlawful obstruction on a well defined trail, traveled for more than a year, cannot be sustained in the absence of some evidence connecting the defendant with the doing of the unlawful act causing the injury, under section 7550, Rev. Codes. Kuhnert v. Angell, 198.

A court cannot take judicial notice of the market price of wheat at any particular date. Towne v. Elevator Company, 200.

A chattel mortgagee, or the owner of grain under a farm contract, cannot recover in conversion against an innocent bailee of the grain without notice, excepting on proof of a demand for possession, and refusal. Towne v. Elevator Company, 200.

EVIDENCE.—Continued.

Under a certain farm contract the lessor's right to the possession of the crop was conditional and not absolute, and the lessor had the burden of proving the existence of the conditions named in the instrument. Lane v. O'Toole, 213.

The declarations by the seller of property, tending to defeat the title of a remote purchaser, are inadmissible on the part of the creditors of the seller as against such purchaser, in the absence of proof of collusion between the seller and the buyer to defraud such creditors. Paulson Mercantile Co. v. Seaver, 215.

A statement by the seller in the presence of a buyer and of an agent of a creditor of the seller impeaching the good faith of the sale as to the creditors of the seller, is admissible against the buyer where he failed to contradict the statement when made. Paulson Mercantile Co. v. Seaver, 215.

Where the president and general manager of a corporation, the buyer of property, stated to a creditor of the seller that such property was still the property of the seller, his declarations are admissible against the buyer. Paulson Mercantile Co. v. Seaver, 215.

Evidence of intoxication cannot be considered by a jury for the purpose of justifying or excusing the commission of a crime which has in fact been committed. State v. Koerner, 292.

It was error for the court to reject evidence from the defendant of his intoxicated condition at and just prior to the commission of the alleged larceny, as bearing upon the existence of the intent. State v. Koerner, 292.

Evidence of intoxication is competent for the purpose not of justifying or excusing the crime, but to aid the jury in determining whether, in fact, the crime has been committed. State v. Koerner, 292.

In an action to recover a gross sum for value of the use of a hack and team wrongfully detained by the defendant, and for a fixed period, it is not necessary to plead specially unusual conditions, which make the value of the use greater on some days than others, to render evidence of such greater value admissible, when the conditions are equally within the knowledge of both parties. Hill v. Wilson, 309.

Evidence as to the value of the use of personal property upon particular occasions which create an unusual demand for that kind of property is not subject to the objection that it is speculative, when the evidence is based upon known conditions of demand and value existing at the time. Hill v. Wilson, 309.

In an action to recover damages against a defendant for an assault with intent to commit rape, evidence of his general reputation for chastity was properly excluded. Kinneberg v. Kinneberg, 311.

Evidence in support of a verdict returned for plaintiff for alleged alienation of affections, examined, and *held* insufficient to sustain a verdict. Kinneberg v. Kinneberg, 311.

It is competent to impeach a witness by proof of contradictory statements made before the trial in the form of an affidavit, signed and sworn to by the witness. Baumer v. French, 327.

In an action to recover damages from a railroad company occasioned by fire which was started by one of the defendant's locomotives, the presumption of defect in the construction or equipment of such locomotive, or of negligence in its operation, which the statute raises, has been overcome by proper evidence introduced by the defendant, yet the evidence shows that the same locomotive, on the same day,

EVIDENCE.—Continued.

and within a distance of ten miles or less, set three different fires, it is not error to submit to the jury the question of defects in the construction or equipment of such locomotive, or negligence in its operation. McTavish v. Great Northern Ry. Co., 333.

In an action brought to recover damages for the destruction of property by fire, alleged to have been caused by negligence, it is not error to permit plaintiff to prove that after the fire defendant caused fire breaks to be constructed on both sides of its track along the line of the right of way, for the purpose of showing what right of way had been in use by the defendant. Young v. Great Northern Ry. Co., 345.

In an action against a warehouseman for grain stored in a public warehouse, the defendants alleged that their warehouse was destroyed by fire, with its contents, and that plaintiff's grain was also destroyed in said fire. Plaintiff, by reply, admitted the burning of the warehouse, but denied the burning of the grain. *Held*, that the burden of proof was on defendants to establish that plaintiff's grain was so destroyed. Marshall v. Andrews & Gage, 364.

In an action for conversion against a warehouseman, evidence of demand and refusal raise a prima facie presumption of conversion, notwithstanding proof of the destruction of the warehouse by fire. Marshall v. Andrews & Gage, 364.

It is competent for the legislature to make the recitals in a tax deed conclusive as to the description of the land upon which the tax was delinquent, and as to the land sold, and where the descriptions were unambiguous it was not proper to consider evidence on these points dehors the deed. Roberts v. First Nat. Bank, 504.

A member of a partnership who seeks to avoid a partnership settlement, and to secure a full accounting, must not only show facts which would authorize a court of equity to disregard the settlement but also produce evidence of such a character that an accounting can be made. In the absence of such evidence, the balance found upon the settlement will not be disturbed except as to items which are shown to be erroneous. Lay v. Emery, 515.

Where a defendant in a charge of burglary bored holes into a granary in the night time, through which holes a mass of wheat escaped and was carried away and sold by the defendant, *held*, that the intent to steal within the granary was sufficiently shown by the fact that the wheat which was stored inside of the granary was by defendant's agency transferred from the inside to the outside thereof. State v. Crawford, 539.

In a prosecution under the prohibition law where the evidence disclosed the sale and keeping for sale of beer, it was proper for the court to instruct the jury that beer was a malt liquor, and intoxicating, and that if defendant claimed the beer he sold or kept on sale was not intoxicating, the burden was upon him to so show. State v. Currie, 545.

Threats made for the purpose of destroying or withholding evidence may be proven as raising a presumption that such evidence is detrimental to the party seeking to destroy or withhold it. State v. Rosum, 548.

A defendant in a criminal case on cross-examination may be inquired of as to collateral crimes, notwithstanding the answers may disgrace him in the eyes of the jury. State v. Rosum, 548.

A defendant may be cross-examined as affecting his credibility concerning collateral crimes, and if a privilege is claimed on the ground

EVIDENCE.—Continued.

that the answers will tend to criminate him it must be claimed by the defendant personally under oath and cannot be claimed by his counsel for him. State v. Ekanger, 559.

In a suit by aged and illiterate persons to set aside a deed to a child, the burden is upon the child to show the fairness of the transaction. Brummond v. Krause, 573.

In a suit to set aside a deed made by old and illiterate persons, it must be shown that they understandingly and knowingly assented to the contract. Brummond v. Krause, 573.

In an action to cancel and set aside a deed given by parents to their adult child for the alleged fraud of the latter in procuring it to be executed, where it appeared that the parents were feeble from age, as well as illiterate, and that a relation of confidence and trust existed between them by reason of their dependency on such child, the burden of proof is upon the child to show the fairness of the transaction, and it is not enough to show that the contract was read to them, it must also appear that they understood it and assented to it knowingly. Brummond v. Krause, 573.

One who seeks to charge a banking corporation organized under the state banking law upon a loan made to it through one of its officers, must show that such officer had express authority from the directors to make the loan, or that it was ratified by them. First Nat. Bank v. Michigan City Bank, 608.

The court will take judicial notice of the ordinary course of business in storing grain, and that general elevator storage tickets do not call for a redelivery of the identical grain, but only of a certain number of bushels of a particular kind. Best v. Muir, 44.

In an action by a pledgee of stock to recover damages from the purchaser of it at a judicial sale, the value of his special interest must be established. Second Nat. Bank v. First Nat. Bank, 50.

The evidence necessary to defeat a perfect legal title to land on the ground of estoppel must be clear, strong and convincing. Morris v. Ewing, 99.

Evidence of intent to steal after breaking into granary, *held* sufficient to sustain a conviction of burglary. State v. Crawford, 539.

The defendant, as sheriff, seized goods as the property of plaintiff's vendors. He sold it as their property and applied the proceeds on their debt. He cannot therefore be heard to say that they never had any title to the goods. Tetrault v. O'Connor, 15.

EXEMPTIONS. See HOMESTEAD.

Under Sec. 3625, Rev. Codes, an unmarried man who has residing with him, and under his care and maintenance, a married adult brother, who is unable to take care of or support himself, is the head of a family. Webster v. McGauvran, 274.

In the verified schedule of property which the law requires an exemption claimant to deliver to the officer who has levied upon his property, it is not necessary for the claimant to state that he is the head of a family. Webster v. McGauran, 274.

Where an officer unlawfully refuses to turn over exemptions, a civil action in the nature of trespass, trover or replevin will lie against him and his bondsmen for such refusal. Oliver v. Wilson, 590.

Where an officer under warrant of attachment seized personal property claimed by the debtor to be exempt, the defendant has a sufficient remedy by motion to discharge the attachment. Oliver v. Wilson, 590.

EXEMPTIONS—Continued.

There can be no fraud as to creditors in the sale of exempt personal property. Tetrault v. O'Connor, 15.

The temporary removal from the family homestead with no intent to permanently reside elsewhere but to return and reside thereon, does not cause the place to lose its homestead character, but an execution levy thereon during the temporary absence of the family will be set aside upon exemption claim made, and homestead character being shown. Edmonson v. White, 72.

FACTORS AND BROKERS.

Defendant, as sheriff, seized certain sheep on writ of attachment against the property of B. Plaintiff sued the sheriff in replevin for the sheep, and alleged that as agents and factors of B. they had made large advances of money to B., and that they were in possession of said property as such factors, and had a lien thereon for such advances. At the close of the evidence the court intimated that it might find it necessary to direct a verdict for defendant; whereupon plaintiffs, while insisting that the complaint was sufficient and supported by the evidence, yet, to avoid such ruling, obtained leave to amend by pleading ownership as to a portion of the property. Subsequently they served a proposed amended complaint embodying such claim. Defendant in the meantime served notice of an application for an order setting aside the order allowing the amendment. While this was pending, plaintiffs withdrew their proposed amendment and offered another not claiming ownership. Ultimately the court set aside its order granting leave to amend and denying any amendment. *Held*, that, by pleading or offering to plead ownership, plaintiffs did not waive their right to insist on a factor's lien. Rosenbaum v. Hayes, 461.

A factor's lien will be lost by voluntary surrender of possession, whereby the factor loses control of the property; and where the factor knowingly permitted the owner to take the property in his possession for several weeks, and treat it as his own and in his own interest, and largely denude it of value, and ship a portion of it in his own name, the law will conclusively presume that the factor's lien was lost. But, if thereafter the remnant of the property be again placed in the hands of the factors as such, the lien will again attach. Rosenbaum v. Hayes, 461.

FALSE IMPRISONMENT. See PLEADING, 406.

FARM CONTRACTS. See TROVER AND CONVERSION, 570.

Right to possession of grain grown under a farm contract. Lane v. O'Toole, 210.

A farm contract construed. Lane v. O'Toole, 213.

FELLOW SERVANTS. See MASTER AND SERVANT, 124-618.

FINDINGS OF FACT. See APPEAL AND ERROR.

Findings of fact will not be reviewed on appeal under Sec. 5630, Rev. Codes, where the certificate of the trial court fails to disclose that all testimony offered on the trial has been preserved in the stated case. Edmonson v. White, 72.

Upon appeal in a case tried under Ch. 5, Laws 1897, it is not proper practice for appellant to designate the questions of fact he desires retried, by reference to the findings of fact by number. Farmers' & Merchants' Nat. Bank v. Davis, 85.

A finding that "all the allegations of the complaint are true" is suffici-

FINDINGS OF FACT—Continued.

ent on appeal against an assignment that the same does not constitute a finding of fact but without pointing out the particulars wherein it is insufficient. Brynjolfson v. Thingvalla, 106.

FORECLOSURE OF MORTGAGES. See MORTGAGES, 162.

It is necessary to a valid affidavit of foreclosure sale that it show on its face that the sale was made by a person authorized to make it; and, when the party making the sale states in his affidavit that he is deputy sheriff, the statute makes the affidavit prima facie evidence of that fact, and no other proof of his official capacity is required until such prima facie case is overcome. First M. E. Church v. Fadden, 162.

FOREIGN CORPORATIONS. See INSURANCE, 302; BUILDING AND LOAN ASSOCIATIONS, 136, 145.

FORFEITURES. See VENDOR AND PURCHASER, 306.

FORGERY. See BANKS AND BANKING, 608.

FRAUD AND DECEIT. See PLEADING, 191.

Where the holder of a sheriff's certificate of sale of land prevented the owner by fraud and false promises from redeeming within the statutory period, and, in violation of his oral agreement to extend the period of redemption, took a sheriff's deed, equity will give relief in damages. Prondzinski v. Garbutt, 191.

When a deed given by parents to their adult child is attacked for the alleged fraud of the latter in procuring it to be executed, and it appears that the parents were feeble from age as well as illiterate, and that a relation of confidence and trust existed between them by reason of their dependency on such child, the burden is upon the child to show the fairness of the transaction. Brummond v. Krause, 576.

Under the facts stated in the opinion showing that the deed executed by the plaintiffs to their daughter was for a grossly inadequate consideration, and that it was signed by them under the controlling influence of such daughter and her husband, and in ignorance of its nature and effect, and without negligence on their part, *held*, that such deed is void, and that the mortgage thereafter executed by the grantee and her husband is also void, it appearing that the mortgagee had full knowledge of the facts leading up to the execution of the deed and the means by which it was obtained. Brummond v. Krause, 573.

A chattel mortgage of a stock of merchandise is not per se fraudulent because the mortgagor is permitted to remain in possession and to retail the goods for the benefit and account of the mortgagee. Red River Valley Nat. Bank v. Barnes, 432.

An action may be maintained to recover back money obtained by fraud and under circumstances which in equity and conscience require that it should be repaid. Krump v. First State Bank, 75.

Payment for plaintiff's interest in a shipment of grain was included in a worthless check which was cashed by defendant bank and her share paid her. On discovery of the worthlessness of the check the bank demanded reimbursement. Plaintiff paid the amount she received but claimed that payment of the amount due from her was accomplished by fraudulent representations. *Held*, that she could not recover from the bank. Krump v. Bank, 75.

FRAUDS, STATUTE OF. See SALES, 153.

GARNISHMENT.

Where the material inquiry was as to whether an account had been transferred prior to its garnishment so as to vest title in another, it was error to instruct that if the jury should find that at a time prior to the garnishment an oral agreement for the sale of the account to plaintiff was reached, then they must find for plaintiff as against the garnishor, since not confining plaintiff's right to an actual purchase of the account, as distinguished from an agreement to purchase. Roberts v. First Nat. Bank, 474.

GENERAL DENIAL. See PLEADING, 186.

HABEAS CORPUS. See INSURANCE, 301.

The state is a necessary party in habeas corpus proceedings, and the proceedings should be entitled in the name of the state upon the relation of petitioner. Carruth v. Taylor, 166.

A final order in habeas corpus proceeding is not an appealable order. It is not a final order in a special proceeding affecting a substantial right, within the meaning of Ch. 39, Code Civil Procedure, §§ 6096 to 6129, Rev. Codes. Carruth v. Taylor, 166.

The Supreme Court has original jurisdiction in matters of habeas corpus and the legislature cannot deprive it of such original jurisdiction. Carruth v. Taylor, 166.

After petitioner has been remanded in the District Court the Supreme Court may issue a writ and reinvestigate the entire matter. The adverse determination in the District Court is not a bar to another proceeding under § 8651, Rev. Codes, as amended by Ch. 85, Laws 1897. Carruth v. Taylor, 166.

Habeas Corpus is the proper remedy by which to test the legality of a person's detention in the state penitentiary where the judgment of conviction and committment are questioned upon jurisdictional grounds. State ex rel Baker v. Boucher, 277.

Habeas corpus denied upon the ground that petitioner was legally in custody for violation of § 3124, Rev. Codes. State v. Hogan, 301.

HAWKERS AND PEDDLERS.

The act of the sixth legislative assembly regulating peddling, cannot be sustained as a police regulation after the elimination of the revenue features, which are unconstitutional. State v. Klectzen, 286.

HIGHWAYS.

The filing in due time in the office of a city auditor of a proper claim for injuries caused by a defective sidewalk, and the presentation of such claim by the auditor to the mayor and council by reading the same to them at a regular session while the mayor was present and presiding, is a sufficient presentation of the claim, under N. D. Rev. Codes. Secs. 2171, 2172, making the mayor and common council of a city a board of audit for such city, and requiring all claims for injuries from defective sidewalks to be "presented" to the mayor and common council by written notice. Coleman v. Fargo, 69.

The statute requiring notice to be served upon a city of injury sustained by reason of defects in streets or negligence of city authorities is mandatory, such notice must comply with the statutes and its service is a necessary condition precedent to a suit against the city. Trost v. Casselton, 534.

HOLIDAYS. See ELECTIONS, 545.

The first Tuesday in March, being the day upon which, under the statute, civil townships hold their annual township meetings, and, among other things elect township officers, is not a legal holiday. State v. Currie, 545.

HOMESTEAD. See INTOXICATING LIQUORS, 548; EXEMPTIONS, 274.

A tract of land does not cease to be a homestead because at a particular time there is no house on it fit to live in, where the claimant, though living elsewhere, fully intends to return and reside upon the land. Edmonson v. White, 72.

HUSBAND AND WIFE. See DIVORCE, 233.

A decree of divorce granted in favor of a husband and which directs that he shall provide, care for, maintain and educate his minor son, without awarding the custody of the child, or directing the payment of a specified sum, does not change the statutory duties of the father in that regard. Glynn v. Glynn, 233.

In an action for the alienation of the husband's affections, where it appeared that the husband's regard for the wife had not been disturbed by any of the scandalous matters involving her reputation, a verdict in her favor was set aside. Kinneberg v. Kinneberg, 311.

A husband was indebted to his wife in the sum of $6,000.00. He promised to purchase a home and place the title in her name. With her knowledge and consent, he negotiated for and purchased a house and lot, and procured the deed to be made in her name, and delivered the same to her. *Held*, that the husband was the agent for his wife in making the purchase, and in law she is chargeable with full knowledge of the details of the transaction, and does not occupy the position of an innocent purchaser for value from her husband, although she received the conveyance in actual ignorance of the terms and conditions of the purchase. Bray v. Booker, 347.

Where F. executed certain notes and a mortgage upon certain real estate belonging to himself to secure the same, and, at his request, his wife also executed the mortgage, and the mortgage contained an express covenant that the mortgagor should pay the debt thereby secured in accordance with the terms of said notes, but the wife did not sign the notes, and the mortgagee knew that the debt secured was the debt of F, the obligation assumed by the wife in the covenant contained in the mortgage was, to the knowledge of the mortgagee, that of surety only. People's State Bank v. Francis, 369.

A husband charged with maintaining a common nuisance under the liquor law, cannot shield himself from responsibility by showing that the home in which intoxicating liquors were sold, with his knowledge and consent, was owned by the wife, or leased in her name, or that she made the sale or sales complained of. State v. Ekanger, 559: State v. Rosum, 548.

ILLEGITIMATE CHILDREN. See SUCCESSION, 376.

INCEST. See CRIMINAL LAW, 563.

The female participant in incestuous intercourse, whose action is voluntary and uninfluenced by any element of coercion, is an accomplice in the crime of incest. State v. Kellar, 563.

INDEMNITY.

Where an action between individuals results in a judicial determination that certain taxes are illegal the judgment is prima facie valid and is conclusive against the liability of the county until attacked. The county is not in the position of an obligee in an indemnity bond and is not entitled to notice of the suit or an opportunity to defend in it. Paine v. Dickey County, 581.

Section 88, Ch. 126, Laws 1897. in so far as it permits the recovery of money paid into the county treasury for illegal taxes, prior to the pasage of the act, is void as in conflict with § 61, Const. Divet v. Richland County, 65.

INDICTMENT AND INFORMATION. See CRIMINAL LAW, 548.

INJUNCTION.

The secretary of state may be enjoined from certifying to the county auditor the names of candidates illegally nominated for office. State v. Falley, 90.

An injunction will issue at the suit of tax payers, to enjoin municipal improvements by municipal corporations and the expenditure of public funds therein, when the corporation is involved beyond the statutory or constitutional debt limit. Engstad v. Dinnie, 1.

INSOLVENCY. See ARREST, 406.

INSTRUCTIONS.

An instruction that a lease of real property for more than one year is void because not in writing, is erroneous where the contract has been executed in whole or in part. Peoples v. Evens, 121.

The following instruction under the facts of the case *held* improper "An agreement to file a homestead entry upon land for the benefit of another is unlawful and void and does not furnish any lawful consideration for any contract. Every contract must be upon a lawful and valid consideration and unless the lease for this land, if you find there was a lease, was upon a lawful consideration, then your verdict must be in favor of the defendant." Peoples v. Evens, 121.

Where both the making of the contract and the acceptance of the goods were in issue and controverted by the evidence, it was error to instruct the jury that "practically the only issue in the case is the question as to whether there was a contract entered into between the parties." Dinnie v. Johnson, 153.

An instruction to a jury in case of disputed boundaries that "the line as fixed by the surveyor at this time is presumptively correct," cannot be upheld under section 2028, Rev. Codes. Radford v. Johnson, 182.

An instruction that the defendant, by virtue of certain storage tickets held by him, had constructive possession of the grain therein described, and that his refusal to comply with the demand of a mortgagee of the wheat for possession thereof operated as a conversion of the wheat by the ticket holder, and that an action would lie for such conversion was *held* error, in that the wheat tickets did not entitle the defendant to demand or receive possession of any particular wheat, much less the identical wheat upon which the plaintiff had a lien, defendant not having placed said wheat in the warehouse. Plano Mfg. Co. v. Jones, 315; Best v. Muir, 44.

INSTRUCTIONS.—Continued.

Where the evidence in a liquor case under the prohibition law, tended to show a sale and keeping for sale of beer it was proper for the court to instruct the jury that beer was a malt liquor and intoxicating, and that if defendant claimed the beer sold by him was not intoxicating the burden was on him to show it. State v. Currie, 545.

An instruction, in the following language, sustained, "if you believe from the evidence in this case that the defendant is not guilty, that he has not kept this place, that he has not sold this liquor then it is your duty under your oaths to find him not guilty. It is equally your duty if you believe this defendant to be guilty to say so by your verdict." When the court had elsewhere in the charge fully explained the doctrine of reasonable doubt it was not necessary to include the words reasonable doubt in this portion of the charge. State v. Currie, 545.

Where defendant was charged with maintaining a liquor nuisance at his home, the lease of which was in his wife's name, it was proper to instruct the jury that if the wife kept and sold liquors in the home with the knowledge and consent of the husband he could be convicted. State v. Ekanger, 559.

INSURANCE.

A violation of the provisions of Sec. 3124, Rev. Codes, forbidding any agent to act for any insurance company in transacting the business of insurance without procuring a certificate of authority as therein specified, is a crime under the laws of this state. State v. Hogan, 301.

A corporation which undertakes to guarantee a fixed revenue per acre from farming lands, and which, in order to do so, contracts, for a specified consideration, to pay such fixed amount per acre for the crop grown upon said land, irrespective of its value, is an insurance company within the provisions of Secs. 4441 and 4445, Rev. Codes. State v. Hogan, 301.

INTENT. See CRIMINAL LAW, 292.

INTERVENTION. See TAXATION, 65, 581.

A party who purchases property from a defendant pendente lite may, with the permission of a court of equity and under section 5234, Rev. Codes, appear in the case at any stage of the proceedings to defend his interests. Anheier v. Signor, 499.

INTOXICATION. See CRIMINAL LAW, 292.

INTOXICATING LIQUORS. See PLEADING, 111.

Money paid for intoxicating liquor sold in violation of law may be recovered back, a demand for its return first having been made. Oswald & Co. v. Moran, 111,

Under Sec. 7621, Rev. Codes, requiring a demand to be made for the return of money paid illegally for the purchase of liquors, the payment of such money will not constitute a good defense and counterclaim in a suit by the liquor seller on a note unless such demand is shown. Oswald v. Moran, 111.

Where, in a prosecution under the prohibition law the evidence tended to show the sale and keeping for sale of beer, it was proper for the court to instruct the jury that beer was a malt liquor, and intoxicating, and that if defendant claimed the beer he sold or kept on sale was not intoxicating, the burden was upon him to so show. State v. Currie, 545.

INTOXICATING LIQUORS—Continued.

Where a husband knowingly suffers intoxicating liquors to be kept for sale and sold in the house in which he lives with his family, it is no defense to a prosecution for keeping and maintaining a common nuisance, that the title to the house is in the wife and that she furnishes and sells the liquors. State v. Rosum, 548.

It is no defense to a prosecution for keeping and maintaining a common nuisance that the building in which the liquors were sold was occupied by defendant and his wife as their home, and the lease was in the name of the wife who paid the rent and kept and sold the liquors therein, with the knowledge and consent of the defendant. State v. Ekanger, 559.

JUDGMENTS. See CONTRACTS, 544.

The entry of judgment in the judgment book constitutes the judgment, and not merely the evidence of the judgment. Consequently the entry of judgment on November 28th nunc pro tunc as of the 17th of the preceding April cannot make effective an attempted appeal from said judgment, taken during the intervening June. McTavish v. Great Northern Ry. Co., 333.

Mere irregularities in the entry of judgment may be corrected upon motion. Ingwaldson v. Skrivseth, 544.

Taking of money judgment by principal against agent for goods wrongfully withheld by the latter does not invest agent with title unless the judgment is paid. Gilman v. Township of Gilby, 627.

An appeal taken from an order directing judgment to enter, but before the judgment is in fact entered, and where the notice of appeal specifies that it is taken from the judgment, the same is premature and will be dismissed on motion. Oliver v. Wilson, 590.

A judgment in claim and delivery is conclusive upon both parties thereto as to the right of possession of the property in dispute and the value thereof, and the damages to which the successful party is entitled to the date of the verdict or decision. Paulson v. Nichols & Shepard Co. 606.

The final order allowing a receiver's account, and directing payment of a certain sum to one who rendered services to the receiver, is not a judgment, within Rev. Codes, Sec. 5499, relating to offsetting judgments. Patterson v. Ward, 87.

Under Rev. Codes, Sec. 5499, providing that mutual final judgments may be set off pro tanto, an order allowing a claim of the debtor against a receiver for services cannot be set off against the judgment in the action in which the receiver was appointed, the parties not being the same. Patterson v. Ward, 87.

JUDICIAL NOTICE. See EVIDENCE, 44-200.

JURISDICTION. See SUPREME COURT, 166; HABEAS CORPUS, 166; JUSTICE OF THE PEACE, 226.

The District Court has jurisdiction to try a defendant on an information filed by a state's attorney, even though the committing magistrate has failed to indorse his order of committment upon the complaint as required by Sec. 7966, Rev. Codes. State v. Rosum, 548.

JURY. See RAILROADS, 333; TRIAL, 595.

The question of whether the decedent as an employe of defendant assumed the risk involved in taking care of a train, from which the steps had been removed from the rear sleeper, was a question of fact for the jury under the evidence. Cameron v. Great Northern Ry. Co. 124.

A new trial will be granted for misconduct of the jury when the motion is seasonably made. Kinneberg v. Kinneberg, 311.

In an equity case where the court calls a jury for advisory purposes upon special questions, the case cannot be tried anew in the Supreme Court under Ch. 5, Laws 1897. Peckham v. Van Bergen, 595.

The fact that a juror states upon his voir dire that he has an impression concerning the guilt or innocence of the accused which is will require evidence to remove does not necessarily disquality him as a juror. State v. Ekanger, 559.

JUSTICE OF THE PEACE.

Where, by consent of parties, a nonresident plaintiff in Justice's Court deposited with the court an agreed sum in lieu of security for costs, defendant cannot on a change of venue to another justice demand other security. Benoit v. Revoir, 226.

Under Sec. 6683, Rev Codes, a justice of the peace has authority to hold a case open for 24 hours for the purpose of considering questions that have been submitted to him in the case. Benoit v. Revoir, 226.

On plaintiff's application, based upon an affidavit, and over defendant's objection, a justice continued a case for the purpose of procuring testimony. The affidavit was insufficient in matter of substance. Defendant appeared on the adjourned day, and without withdrawing his general appearance, attempted to appear specially, and moved the court to dismiss the case for want of jurisdiction because there was no security for costs, and this being overruled, made further motion and participated in a trial on the merits. *Held*, that assuming the justice lost his jurisdiction, defendant restored jurisdiction of his person. Benoit v. Revoir, 226.

LACHES. See MUNICIPAL CORPORATIONS, 1.

LAND CONTRACTS. See VENDOR AND PURCHASER, 499.

LANDLORD AND TENANT. See CONVERSION, 200; CLAIM AND DELIVERY, 210.

The provisions of a verbal lease, so far as executed, governed the rights of the parties although repugnant to the statute of frauds, in that the term covered thereby exceeds one year. People v. Evens, 121.

The title and interest of a tenant in grain produced by him upon land cultivated under a written lease from the owner of the land which has not been abrogated or suspended, is to be determined by the terms of such lease. Clendening v. Hawk, 419.

Where a tenant, during the life of the lease, entered into a written contract with a third person, who assumes to act therein as the agent for the owner, but is not so in fact, whereby the tenant is to receive a fixed compensation in money, instead of a share of the crop, such contract, not being authorized or ratified by the landlord, does not alter or supersede the original lease. Clendening v. Hawk, 419.

LARCENY. See CRIMINAL LAW, 539.

Rev. Codes, Sec. 6815, which provides that the intoxication of one accused of crime may be considered by the jury in determining the particular purpose, motive or intent with which the acts were committed, when such purpose, motive or intent is necessary to constitute a particular species or degree of crime, construed, and *held*, that larceny, which is a crime requiring the existence of the specific intent to deprive another of the property taken to constitute the crime, is included thereunder, and that the intoxicated condition of the defendant may be shown, to be considered by the jury for the purpose of determining whether this intent actually existed. State v. Koerner, 292.

LICENSES. See INSURANCE, 301; HAWKERS AND PEDDLERS, 286; STATUTES, 286.

LIENS. See MORTGAGES, 282; VENDOR AND PURCHASER, 347; QUIETING TITLE, 413.

LIMITATION OF ACTIONS.

A tax deed valid on its face, which has been of record for more than the full time limited by law in which to bring an action to set aside or avoid such tax deed, is effective to cut off all interest under a prior tax deed on the same property. Meldahl v. Dobbin, 115.

Where there are jurisdictional defects in a tax proceeding the recording of a tax deed issued pursuant to a sale for such tax will not set the statute of limitation running in favor of the party claiming under such deed. Roberts v. First Nat. Bank, 504.

MALICIOUS PROSECUTION. See PLEADING, 406.

MANDAMUS.

Mandamus will not lie to compel an officer to exercise his official discretion in favor of an execution debtor who claims the property seized as exempt, or to compel the officer to turn over the property so demanded. Oliver v. Wilson, 590.

Mandamus will not lie against ministerial officers to compel the exercise of an official discretion in a particular manner. Oliver v. Wilson, 590.

Mandamus will not lie where the plaintiff has a plain, adequate and speedy remedy at law. Oliver v. Wilson, 590.

In cases where defendant makes formal demand for his exemptions upon an officer who has seized defendant's chattels under a warrant of attachment, the officer is bound to exercise discretion with respect to turning over the property claimed as exempt; and in all cases where the officer is convinced that, for any reason, the claimant is under the law not entitled to exemptions, he is in duty bound not to comply with a demand therefor, hence mandamus will not lie to compel him to turn over the property on demand. Oliver v. Wilson, 590.

An order directing a peremptory writ of mandamus to issue after full hearing upon the merits, is a final order affecting a substantial right made in a special proceeding, and is appealable. Oliver v. Wilson, 590.

A void order of the District Court will not be set aside or cancelled by mandamus, but the judge of that court may be compelled to proceed, regardless of such void order, to settle a statement of the case. Kaeppler v. Pollock, 59.

MANDAMUS—Continued.

The Supreme Court may direct the judge of the lower court to proceed, regardless of an invalid order, to settle a statement of the case, although it has no jurisdiction to cancel such order in mandamus proceedings. Kaeppler v. Pollock, 59.

Where the secretary of state has refused to certify nominees to county auditors which had been duly certified to him, it is no defense in mandamus to set up facts showing that such nominations were not made as required by statute. State v. Falley, 90.

MASTER AND SERVANT. See NEGLIGENCE, 124-618.

Employers are bound to furnish reasonably safe and adequate machinery and appliances for the use of their employes; and are liable for injury to an employe in the exercise of due care resulting from the negligent failure to perform such duty. Cameron v. Great Northern Ry. Co., 124.

An employer is bound to make seasonable inspection and repairs of appliances and machinery furnished to an employe for the purposes of keeping them safe. Cameron v. Great Northern Ry. Co., 124.

A railroad company is not, as matter of law, free from negligence toward the conductor of a train in furnishing him with a sleeping car, the steps leading from which had been removed, without fastening the gate between the platform and the steps when such gate might easily have been secured. Cameron v. Great Northern Ry. Co., 124.

A railroad conductor to whom has been delivered a sleeping car as part of a regular through passenger train, is justified in assuming that such car and the steps leading from it are safe, until he actually discovers that the steps have been removed. Cameron v. Great Northern Ry. Co., 124, 618.

A conductor on a passenger train, is not a fellow servant with other employes whose duty it is to provide and inspect cars furnished for the use of conductors, who furnish a car from which the steps have been removed. Cameron v. Great Northern Ry. Co., 124, 618.

MECHANICS' LIENS.

An account to secure a mechanic's lien, filed under Comp. Laws, Sec. 5476, for a balance due for the erection of a passenger elevator at a fixed total price, showing such price, with a full description of the elevator completed, and a statement of the balance due after allowing all credits, is not objectionable on the ground that it does not contain any account of any work done, or material furnished, or credits given, and does not contain an account of the amount claimed to be due. Turner v. St. John, 245.

An account filed for a mechanic's lien, where, for an amount more than was due, but so filed because of an honest mistake of fact, does not defeat the lien. Turner v. St. John, 245.

An account filed for a mechanic's lien, under Comp. Laws, Sec. 5476, showing upon its face separate charges for three separate contracts and separate charges for extras and alterations, preceded by a statement of what each is for and followed by a total credit for cash paid, and statement of balance due; contains a just and true account of the demand due him after allowing all credits within the above section. Turner v. St. John, 245.

A mechanic's lien for the erection of a passenger elevator is superior to the liens of mortgages on the same property taken during the progress of the construction of the building. Turner v. St. John, 245.

MECHANICS' LIENS'—Continued.

A certain note transaction considered and construed to constitute neither payment, nor the giving of collateral security to the lien claimant. Turner v. St. John, 245.

An account in writing and properly sworn to and filed under Sec. 5476, Comp. Laws, is not rendered a nullity by reason of the omission of the jurat, and the fact that the affidavit was properly made by the affiant may be shown by evidence aliunde. Turner v. St. John, 245.

MISDIRECTION. See INSTRUCTIONS, 153.

MORTGAGES. See CHATTEL MORTGAGES, 419; CLAIM AND DELIVERY, 44.

Where the mortgagor of real property was prevented from redeeming against a mortgage sale by fraud and false promises of the holder of the sheriff's certificate of sale, the wrongdoer was treated as an involuntary trustee and relief given the mortgagor notwithstanding the year for redemption under the statute had expired. Prondzinski v. Garbutt, 191.

A grantee of real estate, who takes the same subject to a mortgage thereon, is not required on foreclosure of said mortgage to pay the attorney's fees specified in the mortgage, when the same exceeds that allowed by law. First M. E. Church v. Fadden, 162.

An officer who sold mortgaged property for an amount in excess of what was due under the terms of the mortgage cannot excuse himself for not paying such excess to the mortgagor on demand, by showing that the excess went into the hands of the mortgagee. First M. E. Church v. Fadden, 162.

A chattel mortgagee of wheat cannot recover in conversion against the holder of warehouse receipts for the wheat covered by his mortgage where the holder of the receipts was not responsible for and did not direct the delivery of the wheat into the warehouse. Plano Mfg. Co. v. Jones, 315.

The holder of a junior lien, whose security is being reduced in value by the foreclosure of another lien, and the jeopardy of a possible foreclosure of another prior lien, as well as when it is being decreased in value by the non-payment of interest due on such prior liens by the debtor, may, after such default, buy the prior liens, or pay the defaulted interest, and add the amount so paid to his liens, under Sec. 4676, Rev. Codes. Foster v. Furlong, 282.

Under Sec. 4699, Rev. Codes, a mortgage can be extended only by an instrument in writing formally executed, but this section does not apply to an extension of time for the payment of the debt secured by the mortgage. People's State Bank v. Francis, 369.

On an issue as to whether a deed was intended to be a mortgage there was no evidence to show any oral negotiation for a sale of the land conveyed. The grantor testified that the deed was asked for by the grantee as a security and for that purpose only. Such evidence was not denied by the grantee, or by any one else. At the time the deed was executed the grantor executed two notes in favor of the grantee and delivered them to him. The grantor and his wife continued to reside on the land for 12 years thereafter, and the grantor regularly paid the taxes accruing after the delivery of the deed. *Held*, that the deed is a mortgage. O'Toole v. Omlie, 444.

MORTGAGES.—Continued.

On December 5th, 1885, plaintiffs executed and delivered to defendant O. M. Omlie their deed of warranty of certain real estate owned by Thomas O'Toole. Later, and on February 1st, 1887, plaintiffs executed and delivered to said defendant a quit-claim deed of the same land, which recited that the same was executed to perfect and make absolute the warranty deed. Both deeds were absolute on their face, and the same were duly recorded. *Held*, under the evidence, that both deeds were given as security, and the same were, as between the parties thereto, mere mortgages and were not deeds of absolute conveyance. O'Toole v. Omlie, 444.

Plaintiffs executed a warranty deed of real estate to defendant Omlie as security for a debt due the defendant. While the plaintiffs were residing upon the land the defendant Omlie conveyed the land to the defendant Lane by deed of warranty, which deed was duly recorded. *Held*, that the defendant Lane purchased with constructive notice of plaintiff's rights in the premises, and that Lane's estate and title in the land are subject and subordinate to the rights and equities of the plaintiffs. O'Toole v. Omlie, 444.

In an action to foreclose a mortgage upon real estate, the defendant admitted the debt secured but counterclaimed for moneys alleged to have been paid to plaintiff for the purchase of intoxicating liquors for sale within the state of North Dakota, a demurrer to the counterclaim was sustained in the court below, but reversed on appeal. Oswald v. Moran, 111.

Where a deed was obtained by an adult child from her aged and illiterate parents by fraud, and a mortgage thereafter executed upon the premises so by her obtained, *held*, that the mortgage was void, the mortgagee having full knowledge of the facts leading up to the execution of the deed to the mortgagor and the means by which it was obtained. Brummond v. Krause, 573.

Admissions made by a tenant in common of land in a casual conversation with a stranger several years after the execution and delivery of a mortgage on the land by his co-tenant, will not validate the mortgage as a joint mortgage of both co-tenants if it was not so originally. Morris v. Ewing, 99.

MUNICIPAL CORPORATIONS.

The provisions of article 7 of chapter 28 of the Political Code, embraced within sections 2171, 2174 of the Revised Codes, and relating to the organization and government of cities, considered and construed. Coleman v. Fargo, 69.

The plaintiff, more than 60 days prior to commencing this action, made out and verified in proper form a claim for damages against the defendant for personal injuries resulting from a fall upon a sidewalk maintained by the defendant. Said claim was filed in due time in the office of the city auditor, and subsequently, and within 60 days from the date of the alleged injury, the auditor presented said claim to the mayor and council by reading the same to th m at a regular session, the mayor being then present, and presiding at said session. The claim was never audited and allowed. Upon this state of facts appearing at the trial, the plaintiff was permitted, against objection, to put said claim in evidence. *Held*, that the ruling was not error, and that such presentation of the claim was sufficient as a preliminary to instituting suit on the claim. Coleman v. Fargo, 69.

Rev. Codes, Sec. 2262, construed, and *held*, that a purported appropriation bill of a city was null and void, not having been sanctioned by a majority of the voters, nor by a two thirds vote of the council, and

MUNICIPAL CORPORATIONS.—Continued.

the same being in no way connected with the intended tax levy for the fiscal year. Engstad v. Dinnie, 1.

Under Rev. Codes, Secs. 2190, 2262, a valid tax levy cannot be accomplished by a mere resolution of a city council purporting to levy certain amounts for the general fund, interest fund, and sinking fund of the fiscal year. Engstad v. Dinnie, 1.

Under Rev. Codes, Secs. 2190, 2262, costly improvements in a city cannot be paid for out of the general fund, in the absence of an annual appropriaton bill authorizing such expenditure. Engstad v. Dinnie, 1.

Where there has been no appropriation and no tax levy for a costly improvement, contracts to build such improvements, made by the city council, are void, and a completion of the contracts may be enjoined. Engstad v. Dinnie, 1.

Bill by taxpayers to enjoin the carrying out of a void contract *held* not barred by laches. Engstad v. Dinnie, 1.

A statute authorizing the assessment of a paving tax on the front foot plan, is not unconstitutional as depriving a person of his property without due process of law. Roberts v. First Nat. Bank, 504.

A city engineer in making an assessment for paving purposes may describe the real estate as the title appears of record, particularly where the assessment is in proportion to frontage and not the valuation. Roberts v. First Nat. Bank, 504.

A violation of Sec. 2300, Rev. Codes, providing that no member of the city council shall be interested in any contract entered into by the city, will not defeat a tax levied for the purpose of making payment under the contract. Roberts v. First Nat. Bank, 504.

Section 2172, Rev. Codes, declares that all claims against cities for injury received from defective sidewalks shall within 60 days thereafter be presented to the mayor and council by writing duly verified, describing the time, place, cause and extent of the damage or injury. The following sections declare that no action can be maintained on account of such injury unless such notice has been given. Plaintiff presented her notice in proper time, definitely and distinctly locating the particular place on the sidewalk where the obstruction existed and the injury was received. At the trial her undisputed evidence located the obstruction and injury 100 feet distant from the designated place. Thereupon plaintiff, by leave, amended her complaint to conform to the proof, and defendant then moved to dismiss the complaint as not based on sufficient notice. *Held*, that it was error to deny the motion and submit the question of the sufficiency of the notice to the jury, since the sufficiency of the notice was a question of law for the Court, and as matter of law such notice was insufficient to sustain the amended complaint. Trost v. City of Casselton, 534.

Section 2172, Rev. Codes, providing for notice to the city where one is injured from a defective sidewalk, is mandatory, and makes the presentation of a proper notice a condition precedent to any recovery. Trost v. City of Casselton, 534.

NEGLIGENCE. See TRIAL, 198; MASTER AND SERVANT, 124-618.

Whether or not the defendant was guilty of the negligence charged in the complaint, and whether such negligence, if shown to exist, was the proximate cause of injury, *held*, questions for the jury. Cameron v. Great Northern Ry. Co., 124.

NEGLIGENCE.—Continued.

Whether any negligence of the deceased contributed to his death, *held*, a question of fact for the jury. Cameron v. Great Northern Ry. Co., 124.

A railroad company is not as a matter of law free from negligence toward a conductor of a train in furnishing him with a sleeping car the steps leading from which had been removed without fastening the gate between the platform and the steps where such gate might have been easily secured. Cameron v. Great Northern Ry. Co., 124.

Employers are required to furnish reasonably safe and adequate machinery and appliances for the use of their employes, and are liable to injury to an employe resulting from a negligent failure to perform such duty. Cameron v. Great Northern Ry. Co., 124.

An employer is bound to make seasonable inspection and repairs of appliances and machinery furnished to an employe for the purposes of keeping it safe. Cameron v. Great Northern Ry. Co., 124.

One damaged by a prairie fire negligently set by a railroad company is not guilty of contributory negligence merely because a person familiar with the locality of the fire might have escaped damage therefrom. McTavish v. Great Northern Ry. Co., 333.

Defendant alleged that their warehouse was destroyed by fire, with its contents, and that plaintiff's grain was contained therein. A reply admitted the burning of the warehouse, but denied that plaintiff's grain was contained therein. Under these pleadings, the burden was upon defendants to establish that the plaintiff's grain was destroyed as alleged. Marshall v. Andrews & Gage, 364.

To support a verdict for damages for injuries done to a team of horses and other property, caused by colliding with an unlawful obstruction upon a well-defined trail, traveled for more than one year, under section 7550, Rev. Codes, there must be some evidence connecting the defendant with the doing of the unlawful act causing the injury. Kuhnert v. Angell, 198.

Where it appears that defendant, for his principal, and pursuant to his request, employed a third person to build a fence around certain unoccupied land for which defendant was agent, and had such fence built by a third person, and the latter, in violation of defendant's instructions, and without his knowledge, erects an unlawful fence across such trail, and injury results therefrom, defendant is not liable, under section 7550, Rev. Codes. Kuhnert v. Angell, 198.

An agent is responsible for resulting damages to his principal in neglecting to collect commercial paper entrusted to him for collection. Commercial Bank v. Red River Valley Nat. Bank, 382.

Where an agent for the collection of commercial paper is guilty of negligence with respect to such agency, the measure of damages for such negligence is prima facie the amount of the paper, with interest. Commercial Bank v. Red River Valley Nat. Bank, 382.

A city is liable for damages for injuries resulting to one falling upon a sidewalk because of snow and ice thereon negligently permitted to accumulate by the city; but notice must be brought home to the city, and a claim served within 60 days after the cause of action accrues. Trost v. Casselton, 534.

In an action against a railroad company for its alleged negligence in furnishing the deceased, a passenger conductor, with a train of cars where the steps on the left hand side of the rear end of the sleeping

NEGLIGENCE.—Continued.

car, at the rear of the train, were broken, and had been removed prior to the delivery of said train to the deceased at Minot on the day he was killed, where the broken and unsafe condition of the train was known, or could have been known, to the defendant by the exercise of ordinary care and diligence, where deceased in discharge of his duty as conductor of the train, while the train was moving at great speed, was cast upon the ground and killed, *held*, that the deceased as conductor of the train, and in charge of it, and of the subordinate trainmen, his authority was plenary and absolute with respect to accepting the train as safe and adequate. His authority and duty required him to make a careful inspection of the train delivered into his keeping with reference particularly to its adequacy and safeness as a train for the transportation of pasengers and employes who were to take passage upon it. He had power, and it was his duty under the rules and instructions of the defendant, to inspect the train and to reject any car which, in his judgment, was unsafe, therefore, no recovery can be had because of the negligence charged. The negligence of the defendant being the negligence of the deceased. Cameron v. Great Northern Ry. Co., 618.

A city is liable for the negligence of its officers in failing to keep its sidewalks in repair where a person is injured while walking upon the sidewalk in the exercise of due care. Coleman v. City of Fargo, 69.

Where a railroad company negligently carried a drunken passenger beyond his station, and put him off at the next station, when the passenger was in an imbecile and helpless condition of intoxication, and this fact was known to the employes in charge of the train. It was late at night, the weather stormy and dangerously cold, there were no proper accommodations for travelers at the place except defendant's depot, from which the passenger was ejected. *Held*, that the railroad company was liable for the death of the passenger, he having been frozen during the night. Haug v. Great Northern Ry. Co., 23.

NEGOTIABLE INSTRUMENTS.

The fact that an indorsement was made pursuant to a prior agreement by which the indorser was freed from, and the indorsee assumed, all liability thereon, and that the indorsement was for the sole purpose of transferring title to the indorsee, to enable him to collect it, is a good defense to an action by the indorsee against the indorser upon the indorsement. Dickinson v. Burke, 118.

The fact that a negotiable note is made payable at a particular office does not constitute the party in charge of said office the agent of the holder of such note, to receive payment. Stolzman v. Wyman, 108.

The fact that the indorsee of a negotiable promissory note permits the original payee to collect the interest upon such note as it becomes due, and delivers to the payee the coupon notes, to be delivered to the person making the payments, and the fact that such party making such interest payments, believing without inquiry that such original payee is the owner of said note, does not estop said indorsee, who has kept the principal note in his possession at all times since its indorsement to him, and who has not authorized the original payee to collect the same, and who never received the principal, from enforcing payment from one standing in the shoes of the maker of the note. Stolzman v. Wyman, 108.

A note given in payment of intoxicating liquors sold in violation of the prohibition law, cannot be recovered upon. Oswald & Co. v. Moran, 111.

NEGOTIABLE INSTRUMENTS.—Continued.

Where a party assumes to collect commercial paper for another he is bound to give such collection the preference over any similar claims which he might have on his own account against the same debtor, and if guilty of negligence in making the collection, the measure of damages is prima facie the amount of the paper, with interest. Commercial Bank v. Red River Valley Nat. Bank, 382.

R. was indebted to plaintiff in the sum of $9,000, and gave his promissory note for that amount to plaintiff. On the same day, as collateral to said indebtedness, R. gave to plaintiff his promissory note for $2,000, secured by a chattel mortgage. The collateral paper had no independent consideration. *Held*, that the original indebtedness furnished a consideration for the collateral paper. Red River Valley Nat. Bank v. Barnes, 432.

Extending the time of payment upon the original indebtedness was a sufficient consideration for collateral paper. Such transaction being considered and construed as one action. Red River Valley Nat. Bank v. Barnes, 432.

In an action upon a promissory note, it is competent for the defendant to counterclaim for moneys paid plaintiff for the purchase of intoxicating liquors to be sold within the state contrary to law. Oswald v. Moran, 111.

The cashier of a state banking corporation has no implied power to rediscount bank paper, and the purchaser of such paper takes the risk of the cashier's lack of authority to indorse and sell the same. First Nat. Bank v. Michigan City Bank, 608.

A note otherwise negotiable is not rendered non-negotiable because it provides for higher interest after maturity, or that, in case of default in interest, the holder may declare the whole debt due. Hollinshead v. Stuart, 35.

Maker of negotiable instrument cannot pay the original creditor after transfer, though he is ignorant thereof. Hollinshead v. Stuart, 35.

The fact that an indorsee of a negotiable note with interest coupons attached forwarded the coupon notes, as the interest matured, to the original payee, to be delivered to the maker upon payment, and the further fact that such maker paid such coupon notes with the full belief on his part, but in the absence of all inquiry, that the original payee was the owner thereof, do not estop the indorsee, where the maker paid the principal to the original payee while the note remained in the hands of the indorsee, from setting up the indorsement to himself, or from denying all agency on the part of the payee to collect such note. Hollinshead v. Stuart, 35.

Construing Sec. 7621, Rev. Codes, relating to the traffic in intoxicating liquors: In an action upon a joint promissory note, the defendants answered jointly, setting up a claim against plaintiffs for moneys paid on account of illegal sales of intoxicating liquors made by plaintiffs to one of the defendants; but the answer omitted to allege any demand for the return of the money so paid to plaintiffs. Plaintiffs demurred to such answer upon the ground that the same failed to state facts sufficient to constitute a counterclaim or defense. The trial court overruled the demurrer. *Held*, error. The demurrer should have been sustained, inasmuch as the action arises under a statute which makes a demand a condition precedent of recovery. Oswald v. Moran, 111.

NEW TRIAL.

A new trial granted because of erroneous instructions to the jury. Peoples v. Evens, 121.

A new trial will be granted where the evidence is insufficient in any particular to sustain the verdict rendered. So *held* where the evidence failed to show a voluntary acceptance of goods sold on a parole contract within the statute of frauds. Dinnie v. Johnson, 153.

An instruction not elsewhere cured in the charge which operates to call the attention of the jury away from the vital question in the case, amounts to a misdirection, and will necessitate a new trial. Dinnie v. Johnson, 153.

Where an instruction to the jury assumed certain facts as proven, of which there was no evidence, and which facts were necessary to be proven to justify a recovery, a new trial was granted. Dinnie v. Johnson, 153.

Where a case, exclusively of equity jurisdiction, has been tried as an action at law to a jury, the Supreme Court on appeal will sustain the order of the trial court setting aside the verdict and granting a new trial therein, regardless of the fact that no specific objection was made by either party to such method of trial. Prondzinski v. Garbut, 191.

Where an equity case is tried to a jury a new trial in the Supreme Court cannot be had. The statute, section 5630, Rev. Codes, as amended by Ch. 5, Laws 1897, applies only to cases tried in the District Court without a jury. A new trial ordered. Peckham v. Van Bergen, 595.

A motion for a new trial, based upon the misconduct of the jury, must be accompanied by an affirmative showing that such misconduct was unknown to the moving party before the final submission of the case to the jury, and in the absence of such showing such misconduct cannot be considerad. Kinneberg v. Kinneberg, 311.

Where a party to an action has knowledge of misconduct of the jury, and does not avail himself of it at the earliest opportunity, he is deemed to have waived his right to urge such misconduct as a ground for a new trial. Kinneberg v. Kinneberg, 311.

Defendant served notice of intention to move for a new trial, embracing a notice that the motion would be made upon a statement of the case to be thereafter submitted and allowed. A statement was thereafter settled and allowed. The motion for new trial was thereafter argued on stipulation of counsel, and no objection was made that the statement had not been filed with the clerk prior to hearing the motion. *Held*, that the irregularity in not filing the statement before was waived, and that it could not be for the first time raised on appeal. Plano Mfg. Co. v. Jones, 315.

A motion for a new trial was based on a statement of the case to be settled and which was settled pursuant to notice prior to the hearing on the motion. Subsequently, pusuant to a stipulation between counsel, the motion was argued, no objection being made that the statement had not been filed with the clerk at or prior to hearing the motion. *Held*, that the failure to file is a mere irregularity, which was waived. Plano Mfg. Co. v. Jones, 315.

An order denying a new trial will be sustained where the only ground of motion is insufficiency of the evidence to justify the verdict, and where there was a substantial conflict in the evidence. Becker v. Duncan, 600; Muir v. White, 58.

NEW TRIAL.—Continued.

Applications for new trials when based upon the insufficiency of the evidence to justify the verdict, or upon newly discovered evidence, are addressed to the sound judicial discretion of the trial court, and the Supreme Court in such cases will not disturb the ruling of the court below, unless a case of abuse of discretion is shown. Heyrock v. McKenzie, 601.

NEWMAN LAW. See APPEAL AND ERROR, 72, 595.

NORTHERN PACIFIC LAND GRANT. See STATUTES, 65.

NOTES AND BILLS. See NEGOTIABLE INSTRUMENTS.

NOTICE. See MUNICIPAL CORPORATIONS, 69, 534; TAXATION, 581; VENDOR AND PURCHASER, 347; MORTGAGES, 444; CHATTEL MORTGAGES, 585.

NOTICE OF APPEAL. See APPEAL AND ERROR, 578.

NUISANCES. See INTOXICATING LIQUORS, 548, 559.

A husband who suffers a liquor nuisance to be maintained in the house where he lives with his wife is liable under the statute, although the title to the home is in the wife's name. State v. Rosum, 548; State v. Ekanger, 559.

A preliminary complaint charging defendant with keeping and maintaining a common nuisance in a certain frame building situate on the townsite of Pisek in the proper county and state, contains a sufficient allegation as to the place of the offense. State v. Rosum, 548.

The statutory requirement that the place of the offense must be accurately described in prosecutions for keeping and maintaining a common nuisance, applies only to cases of search and seizure or to trials upon indictment or information, and not to the preliminary complaint. State v. Rosum, 548.

An information in the District Court charging defendant with keeping and maintaining a common nuisance as of a second offense, is sufficient to sustain the prosecution, although the complaint before the committing magistrate does not charge the offense as a second offense. State v. Rosum, 548.

OCCUPATION TAX. See HAWKERS AND PEDDLERS, 286.

OFFSETTING JUDGMENTS. See JUDGMENTS, 87.

Where the District Court has by final order allowed the account of a receiver, and directed therein the payment of a specific sum to one who has rendered services connected with the receivership, this order does not constitute such a judgment as is contemplated by Sec. 5499, Rev. Codes, relating to offsetting judgments. Patterson v. Ward, 87.

Where A. has a judgment against B. who also has an account against C., who is receiver in the litigation wherein A. is plaintiff and B. defendant, and in which the judgment is rendered, B's claim upon the receiver's final account having been allowed by the court and ordered paid from funds then on hand, *held*, that there is lacking the mutuality necessary for offsetting as required by statute. Patterson v. Ward, 87.

PARENT AND CHILD. See HUSBAND AND WIFE, 233; SUCCESSION, 376; BASTARDS, 376; ADOPTION, 376.

PARTIES.

The payee in certain notes indorsed and delivered them to the plaintiff for collection. The plaintiff transmitted the notes to the defendant bank, who negligently failed to make the collection. *Held*, that the plaintiff is the real party in interest and can therefore maintain an action against the defendant for any damages arising from the negligence of defendant in the matter of such agency. Commercial Bank v. Red River Valley Nat. Bank, 382.

Plaintiff brought an action as trustee of real estate for the use and benefit of minor heirs and prayed that a certain judgment described in the complaint might be adjudged a cloud upon the title. The defendant demurred to the complaint. *Held*, that the plaintiff under the facts in the case was not the real party in interest, nor the trustee of an express trust, and was not authorized to sue in his own name for any reason mentioned in Sec. 5223 of the Rev. Codes. Smith v. Security L. & T. Co., 451.

PARTNERSHIP.

A partner cannot gain any advantage over his copartner by misrepresentation or concealment. Lay v. Emery, 515.

A partner may not use partnership property for his own profit, and if he does, may be required to account for the profit made, or value of its use. Lay v. Emery, 515.

Partners who have made a settlement of their accounts in whole or in part, and reduced it to writing, are concluded thereby where it is free from fraud, duress, misrepresentation, concealment or mistake of fact. Lay v. Emery, 515.

In an action for an accounting between partners, where it appears that one of the partners agreed to devote his entire time to the management of the partnership business and that he has retained from the firm funds compensation for his entire time, when in fact he devoted only a portion of it, a court of equity on a final adjustment of the partnership accounts may make this deduction for the value of the portion of his time not so employed. Lay v. Emery, 515.

A member of a partnership who seeks to avoid a partnership settlement and to secure a full accounting, must not only show facts which would authorize a court of equity to disregard the settlement, but also produce evidence of such a character that an accounting can be made. In the absence of such evidence the balance found in such settlement will not be disturbed except as to items which are shown to be erroneous. Lay v. Emery, 515.

PAUPERS.

To entitle one to recover from a county for services or supplies furnished to a pauper to whom such county owes the duty of support and care under the statute, it must appear that the services rendered and support given were in pursuance of an authorization proceeding from some one having authority to bind the county. St. Luke's Hospital Association v. Grand Forks County, 241.

PAYMENT. See NEGOTIABLE INSTRUMENTS, 108; VENDOR AND PURCHASER, 347.

The giving of a worthless check in satisfaction of a debt does not constitute payment. Krump v. First State Bank, 75.

Where two persons having a half interest each in grain sell it to a third, his check payable to one of them, which goes to protest, does not constitute payment. Krump v. First State Bank, 75.

PAYMENTS—Continued.

The maker of a negotiable instrument, although not notified of its transfer, makes payment to the original creditor at his own risk. Hollinshead v. Stuart, 35.

PERFORMANCE. See CONTRACTS, 153.

PERSONAL PROPERTY. See EVIDENCE, 215; SALES, 15; EXEMPTIONS, 15.

Personal property descends according to the law of the domicile of the owner Eddie v. Eddie, 376.

PLEADINGS.

In an action to recover the money paid for intoxicating liquors under section 7621, Rev. Codes, the complaint must aver a demand before suit, else it will be held bad on demurrer. Oswald & Co. v. Moran, 111.

A complaint stating that the holder of a sheriff's certificate of sale of land prevented the owner by fraud and false promises from redeeming within the statutory period, and that in violation of his oral agreement to extend the period of redemption the holder took a sheriff's deed, states a cause of action exclusively for a court of equity. Prondzinski v. Garbutt, 191.

The court should not ordinarily refuse amendments to pleadings. Martin v. Luger Furniture Co., 220.

Defendants, whose original verified answer sets up an alleged agreement between them and the plaintiff, and averred that plaintiff signed, executed and delivered to defendants a certain memorandum set out in the answer, on which defendants rely as a contract, should be permitted where the memorandum is construed by the court to defeat defendant's claim, if it is in fact a contract, to amend so as to allege that the memorandum does not embody the agreement between the parties and that it never became operative as a contract. Martin v. Luger FurnitureCo., 220.

A defendant in claim and delivery under a general denial may show a right of possession superior to the plaintiff either in himself or in a stranger to the action, provided said right of possession is absolute and not dependent on circumstances or conditions. James v. Wilson, 186.

It is the province of the court to declare on what pleadings a case must be tried. Counsel cannot control the matter. First M. E. Church v. Fadden, 162.

In an action to recover the value of the use of a hack and team wrongfully detained by the defendant, it is not necessary to plead specifically unusual conditions, which make the value of the use greater on some days than upon others, to render evidence of such greater value admissible, when the conditions are equally within the knowledge of both parties. Hill v. Wilson, 309.

Where a cause of action for forclosure was joined with a cause of action in tort, a demurrer on the ground that two causes of action were improperly joined was proper. Mares v. Wormington, 329.

A complaint in equity to foreclose a seed lien on a crop of wheat raised by defendant, cannot be amended at the close of the evidence by introducing a second and new cause of action, alleging that the defendant acting jointly or unlawfully converted such grain and asking for a money judgment for such damages for conversion. Mares v. Wormington, 329.

PLEADINGS.—Continued.

A cause of action for false imprisonment and for malicious prosecution should not be joined in a single count of a complaint. Kaeppler v. Red River Valley Nat. Bank, 406.

Under the revenue laws of this state the summary process provided for the enforcement of taxes is an exclusive remedy; and an action in equity in the nature of a suit to foreclose a mortgage does not lie to foreclose a lien upon the land created by a tax levy. McHenry v. Kidder County, 413.

The statutory right to deny allegations in a pleading by denying knowledge or information thereof sufficient to form a belief, is not an absolute right. Accordingly *held*, upon the facts stated in the opinion, that the denial in such form contained in the answer was properly stricken out as sham. Gjerstadengen v. Hartzell, 424.

An absolute denial in an answer of a material allegation in the complaint cannot be stricken out as sham on motion based on affidavits tending to establish the truth of the matter denied. Gjerstadengen v. Hartzell, 424.

The proper method of testing the legal sufficiency of affirmative defences contained in an answer is by demurrer, and not by a motion to strike out. A motion to strike out affirmative defenses contained in an answer, upon the ground that they did not state sufficient facts to constitute a defense or counterclaim, should have been denied. Gjerstadengen v. Hartzell, 424.

Whether an equitable estoppel in pais is required to be pleaded, considered but not decided. Morris v. Ewing, 99.

By replying plaintiff waived an objection that the facts stated did not constitute a counterclaim that could be pleaded in the particular case and could only insist that they did not constitute a cause of action in favor of the defendant that could be enforced against plaintiff under any circumstances. Township of Noble v. Aasen, 77.

In an action under the statute to quiet title where the defendant's answer alleged ownership in defendant and asked for affirmative relief ousting plaintiff from possession and quieting title in defendant, the answer was *held* to embody a counterclaim requiring a reply. Morris v. Ewing, 105.

In an action by a widow to recover damages for the death of her husband, which resulted from the wrongful act of the defendant railroad company, a general allegation of damages coupled with the disclosed fact that the deceased left a widow and children of tender years is sufficient, and particular facts showing damage need not be pleaded. Haug v. Great Northern Ry. Co., 23.

PLEDGES. See NEGOTIABLE INSTRUMENTS, 432.

The interest of the pledgor in corporate stock pledged as collateral security may be attached at the suit of a creditor and sold on execution. Second National Bank v. First National Bank, 50.

A pledgee of bank stock is not entitled as against the bank, which was the owner of the pledgor's interest, to have the same transferred to it on the books of the bank until it established some beneficial interest in the stock. Second Nat. Bank v. First Nat. Bank, 50.

The right of an absolute pledgee of bank stock, having absolute assignment of the certificates, to damages on refusal of the bank, on presentation of the certificates, to transfer the stock on its books determined. Second National Bank v. First National Bank, 50.

POWER OF ATTORNEY.

A power of attorney to sell and convey land by deed of warranty confers no authority to mortgage. Morris v. Ewing, 99.

PRACTICE ON APPEAL. See APPEAL AND ERROR.

A motion to strike out the entire record on appeal, except the pleadings, findings of fact, conclusions of law and judgment, was entertained and the motion granted. Brynjolfson v. Thingvalla, 106.

A motion by respondent to strike from the printed abstract on file all printed matter, being a transcript of the stenographer's notes and specifications of error certified by the District Judge in lieu of a statement of the case, *held* proper and motion granted. Brynjolfson v. Thingvalla, 106.

The rules of court requiring specification of errors of law and of the particulars wherein the evidence does not justify findings of fact to be included in the statement of a case on appeal, does not apply to cases tried under Ch. 5, Laws 1897. Farmers' & Merchants' Nat. Bank v. Davis, 83.

The record must be abridged in the printed abstract on appeal and points must be assigned in appellant's brief. The rule requiring the same is not abrogated in Ch. 5, Laws 1897, doing away with the necessity of condensing into narrative form the evidence certified into a statement of the case. Farmers' & Merchants' Nat. Bank v. Davis, 83.

PRACTICE. See TRIAL, 124.

A motion to dismiss made at the close of plaintiff's evidence is tantamount to a demurrer to the evidence, and in such cases everything which the jury might reasonably infer from the evidence is to be considered as admitted. Cameron v. Great Northern Ry. Co., 124.

The question whether any negligence of the deceased contributed to his death, *held* a question of fact for the jury under the evidence offered. Cameron v. Great Northern Ry. Co., 124.

An answer containing denials of knowledge or information sufficient to form a belief may be stricken out as sham. Gjerstadengen v. Hartzell, 424.

A positive denial of a material allegation in the complaint cannot be stricken out as sham upon motion based on affidavit tending to establish the truth of the matter denied. Gjerstadengen v. Hartzell, 424.

It is not proper to move to strike out affirmative defenses in an answer on the ground that they did not state facts sufficient to constitute a defense or counterclaim. Gjerstadengen v. Hartzell, 424.

To sustain a verdict it must appear that it might have been reached by a jury in the exercise of an unbiased and unprejudiced judgment. The scintilla rule is repudiated in this state. Rosenbaum v. Hayes, 469.

Where a case is taken from the jury, the defeated party has a right to have everything regarded as proven that his evidence has any fair tendency to establish. Rosenbaum v. Hayes, 469.

For the correction of irregularities in the entry of judgment, the proper action is to move for the correction thereof, on notice to the adverse party, in the court in which said judgment is entered, and such irregularities will not be corrected by a motion on appeal. Ingwaldson v. Skrivseth, 544.

PRACTICE.—Continued.

Where there is any competent evidence in the case reasonably tending to sustain the cause of action alleged, and if the evidence is such that intelligent men may fairly differ in their conclusions thereon on any of the essential facts of the case, it is error to withdraw the evidence from the consideration of the jury. Cameron v. Great Northern Ry. Co., 124.

A verdict in an equity case is merely advisory, and the action of trial courts in setting the same aside will not be reviewed by the appellate court. Prondzinski v. Garbutt, 191.

One who for his principal, and pursuant to his request, employed a third person to build a fence around unoccupied land, for which the former is agent, is not liable to one injured as the result of the violation of his instructions, and without his knowledge, in erecting an unlawful fence across a well defined trail, traveled for more than one year, under Sec. 7550, Rev. Codes, providing that every person who builds a specified fence across such a trail shall be guilty of a misdemanor and shall be liable for all the damages resulting therefrom. Kuhnert v. Angell, 198.

The objecting party must point out the specific ground of his objections to all questions put to a witness, and the ruling of the court in overruling the objections made will not be reviewed, though the questions were improper on other grounds than those specified in the objections if the specific objection made is untenable. Baumer v. French, 327.

In an action for malicious prosecution, *held*, under the practice pursued, that it was not error for the court to refuse to direct a verdict for the plaintiff. Kaeppler v. Red River Valley Nat. Bank, 406.

Where, at the close of plaintiff's testimony, the evidence is insufficient to justify a recovery by the plaintiff, a verdict should be directed for the defendant, and a refusal to direct a verdict upon defendant's motion is reversible. Omlie v. Farmers' State Bank, 570.

Where an officer unlawfully refuses to turn over exemptions seized by him upon attachment, a civil action in the nature of trover will lie against him and his bondsmen for such refusal. Oliver v. Wilson, 590.

In equity cases where a jury is called for advisory purposes, the cause cannot be reviewed upon appeal, but a new trial will be ordered. Peckham v. Van Bergen, 595.

A motion for verdict by defendant on close of plaintiff's testimony is waived unless renewed after testimony of case is closed. Tetrault v. O'Connor, 15.

Fraud and false pretenses may be shown to defeat exemption claim. Tetrault v. O'Connor, 15.

Questions calling for the opinion of a non-expert witness are properly overruled. Tetrault v. O'Connor, 15.

Where a question is so framed that an answer cannot aid the jury, it is properly excluded. Tetrault v. O'Connor, 15.

PRELIMINARY EXAMINATION. See CRIMINAL LAW, 548.

A complaint filed with a committing magistrate charging the crime of keeping and maintaining a common nuisance, fixed the locus as in a certain frame building situate on the townsite of Pisek in the proper county and state. The accused waived an examination and was bound over to the District Court. An information was filed against him in that court

PRELIMINARY EXAMINATION—Continued.

which he moved to quash, on the ground that he had never had or waived a preliminary examination for any criminal offense, because no place was fixed and particularly described in the complaint filed with the magistrate. *Held*, that in the absence of an attack thereon, by motion or demurrer, the allegation in the complaint was sufficient and that said complaint did state a public offense. State v. Rosum, 548.

PRESUMTIONS. See EVIDENCE, 124, 136; RAILROADS, 333.

PRINCIPAL AND AGENT. See INSURANCE, 302; FACTORS AND BROKERS, 461; PARTNERSHIP, 515.

The fact that a negotiable promissory note is made payable at a particular office does not make a party in charge of said office the agent of the holder of such note to receive payment, unless the note is actually in the possession of such party. Stolzman v. Wyman, 108.

Where an agent employed a third person to build a fence around certain unoccupied land, for which his principal was agent, and such third person in violation of instructions, and without the knowledge of the principal, erected an unlawful fence across a trail from which injury resulted. Defendant was *held* not liable in the absence of proof of knowledge on his part of the unlawful act, or of proof that he directed it to be done. Kuhnert v. Angell, 198.

Where a husband was indebted to his wife and promised to purchase a home and place the title in her name, and thereafter with her knowledge and consent negotiated for and purchased a house and lot, and procured the deed to be made in her name, and delivered the same to her, the husband was the agent for the wife in making the purchase and she is chargeable with knowledge of the details of the transaction and does not occupy the position of an innocent purchaser for value from her husband, although she receives the deed in actual ignorance of the terms and conditions of the purchase. Bray v. Booker, 347.

Where an agent for the collection of commercial paper is guilty of negligence with respect to such agency, the measure of damages for such negligence is prima facie the amount of the paper with interest. Commercial Bank v. Red River Valley Nat. Bank, 382.

Two notes were indorsed for collection to plaintiff and he transmitted them to defendant for collection. Sec. 4133, Rev. Codes, provides that the mere agent of an agent is not responsible as such to the principal of the latter. *Held*, that plaintiff must sue defendant for any damage arising from the negligence of the defendant in the matter of such agency. Commercial Bank v. Red River Valley Nat. Bank, 382.

When a party assumes to act as an agent for the collection of a claim, he is bound to give such collection the preference over any similar claim which the agent might have on his own account against the same debtor. If the agent cannot do this good faith requires him to decline the collection. Commercial Bank v. Red River Valley Nat. Bank, 382.

Where an agent under a written lease enters into a contract with a third person who assumes to act therein as agent for the owner, but is not such in fact, whereby the agent is to receive a fixed compensation in money instead of a share of the crop, such contract not being authorized or ratified by the land lord does not alter or supersede the oral lease. Clendening v. Hawk, 419.

The rendition of a money judgment in favor of a principal against an agent for value of machines delivered to the latter, to be sold on

PRINCIPAL AND AGENT.—Continued.

commission, does not clothe the agent with title to said machines or to a warrant issued in payment of the same, the judgment not being paid. Gilman v. Township of Gilby, 627.

The cashier of a state bank has no authority to borrow money unless specially authorized by the board of directors. First Nat. Bank v. Michigan City Bank, 608.

One who seeks to charge a state banking corporation upon a loan made through one of its officers must show that such officer had express authority from the directors to make the loan, or that it was ratified by them. First Nat. Bank v. Michigan City Bank, 608.

The delivery of goods by a principal to his agent to sell on commission does not amount to a sale to such agent. Gilman v. Township of Gilby, 627.

A power of attorney to sell and convey land by deed of warranty confers no authority to mortgage. Morris v. Ewing, 99.

Where the only evidence that the grantor in a power of attorney to sell ratified the act of the grantee in mortgaging the premises by accepting a portion of the proceeds was the uncorroborated testimony of a witness as to a conversation between the parties to the power of attorney, which occurred six or eight years previous to the trial at which it was given, and which conversation as to this point was self contradictory, the grantor is not estopped from claiming title to his interest in the land. Morris v. Ewing, 99.

Where a negotiable note was payable at a particular office it does not constitute the party in charge of the office agent of the holder to receive money, unless the note is in his possession. Hollinshead v. Stuart, 35.

The fact that a negotiable promissory note is made payable at a particular office does not make the party in charge of said office the agent of the holder of such note to receive payment, unless the note be actually in possession of such party. Stolzman v. Wyman, 108.

PRINTING. See COSTS, 96; APPEAL AND ERROR, 96.

PROMISSORY NOTES. See NEGOTIABLE INSTRUMENTS, 36, 108, 111, 75.

PROXIMATE CAUSE. See NEGLIGENCE, 124, 618.

PUBLIC OFFICERS. See FORECLOSURE OF MORTGAGES, 162.

Prima facie the acts of public officers, with respect to their official duties, are supposed to be lawful and are entitled to be so considered by all persons until the contrary appears. Engstad v. Dinnie, 1.

QUIETING TITLE.

When the purpose of an action to quiet title is to determine adverse rights in land growing out of tax sales the word "lien" as it appears in the complaint should be restricted to such liens as the court may lawfully pass upon in such an action, viz: liens based on tax sales; and hence, liens not based on tax sales which may be alleged in such answer, will not be adjudicated against the consent of tne plaintiff, and plaintiff's dissent may be indicated by demurring to the answer. McHenry v. Kidder County, 413.

In an action to quiet title under Sec. 79, Ch. 126, Laws 1897, the court may adjudicate on the validity of any liens which are derived through or under a tax sale, or sales, but liens not so derived cannot be passed on. McHenry v. Kidder County, 413.

RAILROADS. See MASTER AND SERVANT, 124; NEGLIGENCE, 124; CONTRIBUTORY NEGLIGENCE, 124, 618, 333.

A railroad company is not free from negligence toward a conductor of a train in furnishing him a sleeping car, from which the steps have been removed, without fastening the gate between the platform and the steps. Cameron v. Great Northern Ry. Co., 124, 618.

An employer is bound to make seasonable inspection and repairs of appliances and machinery furnished an employe, for the purpose of keeping it safe. Cameron v. Great Northern Ry. Co., 124.

Employers are liable for injury to an employe resulting from the negligent failure to supply them with safe and suitable appliances. Cameron v. Great Northern Ry. Co., 124.

In an action to recover for personal injuries received from a prairie fire started by defendant's locomotive, the fact that there was a safer place which plaintiff had plenty of time to reach after he saw the fire coming, does not show contributory negligence where there was nothing to show he knew, or had any reason to believe that there was a safer place. McTavish v. Great Northern Ry. Co., 333.

In an action for injuries from a fire set by a locomotive, where negligence is charged in permitting combustible material to accumulate on the right of way, which was ignited by fire from a locomotive, plaintiff need not prove title or ownership of the locus in quo in defendant, but it is sufficient if he show that defendant was using the ground as a part of its right of way. McTavish v. Great Northern Ry. Co., 333.

In an action to recover damages from a fire started by one of defendant's locomotives, where the presumption of defects in the construction or equipment of such locomotive, or negligence in its operation, which the statute raises, has been overcome by evidence introduced by defendant, yet the same evidence shows that the same locomotive, on the same day, and within a distance of ten miles or less, started three different fires, it is not error to submit to the jury the question of defects in the construction or equipment of such locomotive, or negligence in its operation. McTavish v. Great Northern Ry. Co., 333.

Evidence examined and *held* that the trial court properly directed a verdict for the defendant railroad company, on the ground that the death of plaintiff's decedent was not produced by the negligence of the defendant. Cameron v. Great Northern Ry Co., 618.

The word "railroad" defined. C. M. & S. P. Ry. Co. v. Cass County, 18.

A railroad company accepted a drunken man as a passenger and negligently carried him beyond his station and put him off at another station, from the depot of which he was ejected although the weather was stormy and dangerously cold. He was frozen. *Held*, that the company was liable to his widow for his death. Haug v. Great Northern Ry Co., 23.

RAPE.

In an action to recover damages for an alleged assault with an intent to committ rape, evidence by defendant offered as to his general reputation for chastity was properly excluded, on the ground that such repuation was not involved in the specific acts charged. Kinneberg v. Kinneberg, 311.

RATIFICATION.

The cashier of a state bank has no authority to borrow money unless specially authorized by the board of directors, nor is the bank liable unless the board of directors have authorized or ratified the making of the loan. First Nat. Bank v. Michigan City Bank, 608.

REAL PROPERTY. See TRUSTS AND TRUSTEES, 451, 444, 115; DEEDS, 115; VENDOR AND PURCHASER, 306; SUCCESSION, 376.

Real property descends according to the law of the place where situated. Eddie v. Eddie, 376.

Where the grantor in a deed, absolute on its face, but given for security only, continued in possession of the land, and while so in possession the grantee in the deed transferred the land, by a deed absolute on its face, to a third party, *held*, that the third party took with notice of the grantor's right. O'Toole v. Omlie, 444.

REAL PARTY IN INTEREST. See PARTIES TO ACTIONS, 451.

RECEIVERS.

The final order allowing the account of a receiver and directing the payment of a specific sum to one who has rendered services connected with the receivership creates a demand against the receiver in favor of claimant which is free from equities in favor of a judgment creditor of claimant, and ends the jurisdiction of the court over such claim further than to require the payment of the amount allowed to the party to whom it is due. Patterson v. Ward, 87.

Where a receiver is placed in charge of the assets of a state bank, he stands as to such assets in the place of the bank, and is chargeable with knowledge of all facts known to the bank affecting the character of such assets. People's State Bank v. Francis, 369.

A receiver has authority upon sufficient consideration to extend the time of payment of a debt owing the bank for which he is receiver where by so doing he can, in his judgment, strengthen the security he holds for the payment of such debt. People's State Bank v. Francis, 369.

RECORDING TRANSFERS. See DEEDS, 115.

REDEMPTION. See EQUITY, 191; PLEADING, 191.

REDISCOUNTS. See NEGOTIABLE PAPER, 608.

RELINQUISHMENT. See CONTRACTS, 121.

REMANDING RECORD. See APPEAL AND ERROR, 319.

REPLEVIN. See CLAIM AND DELIVERY, 186, 590, 44, 364, 200.

REPLY. See PLEADING.

Where the answer embodies a counterclaim unless plaintiff replies thereto the counterclaim is admitted. Morris v. Ewing, 105.

In practice where plaintiff fails to reply to a counterclaim, defendant should move for judgment for want of reply. Morris v. Ewing, 105.

Defendant may waive a reply. Morris v. Ewing, 105; Township of Noble v. Aasen, 77.

RULE IN SHELLY'S CASE. See WILLS, 263.

SALES.

Where an oral agreement for the sale of goods and chattels of the value of fifty dollars and upward is made and no part of the agreed price is paid, a mere delivery of the goods and chattels as stipulated in the agreement will not suffice to validate the contract unless there has been a voluntary receipt and acceptance of the goods by the buyer. Dinnie v. Johnson, 153.

Where personal property owned by a copartnership in Manitoba as vendor under conditional sale notes, reserving title in it, is brought into North Dakota by the vendee without the vendor's authority or knowledge, its title to such property continues until defeated by a voluntary waiver thereof. Warnken v. Langdon Mer. Co., 243.

In an action by a vendor on a conditional sale to recover in conversion the value of the property sold, the defense of waiver of title, where the evidence is not clear and convincing, is for the jury. Warnken v. Langdon Mer. Co., 243.

A written assignment of an account was dated January 30th, 1896. There was evidence to show that an agreement in regard to the account made at the preceding Christmas was merely an agreement to sell and not an actual sale. The seller and buyer testified that the settlement was entirely completed at Christmas, and another witness testified that the seller said she had given at Christmas her claims to the buyer and that the buyer had accepted them in full of all his claims against her that he had, *held* that it was for the jury as to when the actual sale was made. Roberts v. First Nat. Bank, 474.

A chose in action may be transferred either by parol or by a written assignment. Roberts v. First Nat. Bank, 474.

Delivery of goods by a principal to an agent to be sold on commission is not a sale to such agent. Gilman v. Township of Gilby, 627.

A bona fide purchaser of realty obtains good title though his vendor's title may have been obtained by fraud. Tetrault v. O'Connor, 15.

SECRETARY OF STATE. See MANDAMUS, 90; ELECTIONS, 90.

SECURITY FOR COSTS. See JUSTICE OF THE PEACE, 226.

SETOFF. See JUDGMENTS, 87.

SHAM ANSWERS. See PRACTICE, 424.

SHELLY'S CASE. See WILLS, 263.

SHERIFFS.

Under Ch. 67, Laws 1897, a sheriff is not entitled to a fee of five dollars upon each description for selling lands for delinquent taxes pursuant to judgment, where such lands are bought in by the treasurer for the county. Wilson v. Cass County, 456.

SIDEWALKS. See MUNICIPAL CORPORATIONS, 534.

SPECIAL PROCEEDINGS. See HABEAS CORPUS, 166; MANDAMUS, 590.

SPECIFICATION OF PARTICULARS. See APPEAL AND ERROR, 578; STATEMENT OF THE CASE, 578.

Specification of particulars where the evidence does not justify the findings of fact are no longer necessary in a statement of the case tried under Ch. 5, Laws 1897. Farmers' & Merchants' Nat. Bank v. Davis, 83.

SPECIFICATION OF PARTICULARS—Continued.

Specification of errors of law are not now necessary in a stated case tried without a jury, under Ch. 5, Laws 1897. Farmers' & Merchants' Nat. Bank v. Davis, 83.

STATEMENT OF CASE. See APPEAL AND ERROR, 315, 83; MANDAMUS, 59; SPECIFICATION OF PARTICULARS, 83.

A mere rescript of the evidence and proceedings as preserved by the court stenographer does not constitute a statement of the case, and will not be so regarded by the Supreme Court on appeal, although certified by the trial court to contain all the evidence and proceedings had at the trial upon which the findings were made. Brynjolfson v. Thingvalla, 106.

A statement of the case used upon motion for new trial which omits specifications stating in what particular the verdict is not justified by the evidence, is not a proper statement, and the trial court is without authority to grant the motion for a new trial but must disregard the statement as to such feature. Baumer v. French, 319.

A state of the case upon which the motion for a new trial is based should be filed with the clerk at or before the hearing of the motion. Plano Mfg. Co. v. Jones, 315.

In actions tried in the District Court without a jury, under the provisions of Ch. 5, Laws 1897, a statement of the case must be settled on appeal, embracing either a specification of particular facts which the appellant desires this court to review, or a statement that the appellant desires a review of the entire case. Ricks v. Bergsvendsen, 578.

The Supreme Court is without authority to retry a case where no statement was settled and the requisite specifications are not set forth in the statement of the case. Ricks v. Bergsvendsen, 578.

Where the alleged statement of the case does not contain any specifications of any particular facts, which the appellant desires to have reviewed, or a statement that a review of the entire case was desired; *held* that the notice of appeal and certificate of the trial court, stating that the appellant desired a trial anew, were inoperative to cure the defect. Ricks v. Bergsvendsen, 578.

Upon an appeal from an order, which was based wholly upon papers and documents, no oral evidence having been offered, it is not necessary to settle a statement of the case. Oliver v. Wilson, 590.

In jury cases mere rescripts of the reporter's notes embodying all the evidence, objections, rulings and exceptions had and taken at the trial, without any attempt at condensation, although settled by the trial judge on stipulation of counsel, will be stricken out as contrary to statute and rules of court. McTavish v. Great Northern Ry. Co., 94.

STATE OFFICERS. See ELECTIONS, 90.

STATES. See STATE OFFICERS, 90.

STATUTES.

When a statute changing a rule of evidence has gone into effect, cases thereafter tried must be governed thereby, unless there be a limitation in the statute, although the pleadings were filed before the law went into effect. First M. E. Church v. Fadden, 162.

It is a well established general rule of construction that when a statute is taken from another state and re-enacted by the legislature without

STATUTES.—Continued.

any changes in its phraseology, the statute is adopted with the construction placed upon it by the court of last resort in the state from which the law was taken. Oswald & Co. v. Moran, 111.

The act of the Sixth legislative assembly, Ch. 118, Laws 1899, entitled "An act taxing the occupation of hawking and peddling and regulating the licensing of persons engaged in such occupation," construed and *held* to be a measure intended to produce revenue by taxing the occupation of peddling; and, *held* further, that the same was also intended as a police measure to regulate such occupation. State v. Klectzen, 286.

Chapter 118, Laws 1899, nowhere states or indicates the object or purposes of the tax, nor does it declare how the revenue to be derived thereunder is to be applied, therefore the act is repugnant to the provisions of Sec. 175 of the constitution, and void. State v. Klectzen, 286.

The statute, Ch. 118, Laws 1899, cannot be sustained as a measure of police regulation after the revenue features of the act are eliminated. State v. Klectzen, 286.

A statute is unconstitutional when the subject of the act is not expressed in the title as required by Sec. 61 of the constitution of the state. Therefore, Ch. 25, Laws 1895, entitled "An act to increase the revenues of the state by changing and increasing the boundaries of the counties of Billings, Stark and Mercer" is void. Richards v. Stark County, 392.

The statute requiring in the canvass of votes a ballot which does not bear the indorsement as provided by Sec. 524, Rev. Codes, of the official stamp and initials of an inspector or judge of election, is a valid statute and not repugnant to the constitution. Miller v. Scallern, 395; Lorin v. Seitz, 404.

Certain ballots were voted and deposited in the ballot box without having indorsed or written thereon the initials of an inspector or judge of an election precinct in which the ballots were cast, said ballots were illegal, and the board of canvassers could not lawfully canvass and count the same under Sec. 527, Rev. Codes. Miller v. Scallern, 395; Lorin v. Seitz, 404.

Laws 1899, Ch. 143, Sec. 1, *held* unconstitutional in that it applies only to school townships which include a city of 800 inhabitants. Plummer v. Borsheim, 565.

Section 84, Ch. 132, Laws 1890, does not conflict with Sec. 61 of the state constitution, and hence is a valid enactment. Paine v. Dickey County, 581.

A case was not tried July 1st, 1897, within the meaning of Ch. 5, Laws 1897, authorizing the granting of new trials. The statute applies only to cases "hereafter" tried. Where the testimony was introduced and the case submitted on January 30th, 1897, although it was subsequently re-opened to admit further testimony, which was never introduced, and the findings were not made and filed until the October following. Second Nat. Bank v. First Nat. Bank, 50.

Ch. 126, Laws 1897, construed with reference to its title. The title of Ch. 126, Laws 1897, after eliminating its repealing features, reads as follows: "An act prescribing the mode of making assessments of property, the equalization of, and the levy and collection of taxes, and for all other purposes relative thereto." *Held*, first, that the subject of the enactment as stated in its title, is that of taxation for

STATUTES—Continued.

the public revenues, and that only; second, that the words, " and for all other purposes relative thereto" do not enlarge the subject of the statute. Divet v. Richland County, 65.

Sec. 88 of Ch. 126, Laws 1897, in so far as the same authorizes the recovery of taxes paid into the county treasury prior to the passage of the act upon land exempt from taxation, *held* that the section is unconstitutional under the provisions of Sec. 61 of the state constitution, in this: That the right to recover taxes paid into the county treasury for the use of private persons by action, is a matter wholly foreign to the subject and purposes of the act, as the same are set out in its title. Divet v. Richland County, 65.

Section 2172, Rev. Codes, requiring claims against cities for damages for injuries through defective, unsafe or obstructed streets, sidewalks, etc., is mandatory. Trost v. City of Casselton, 534.

STATUTES CITED AND CONSTRUED.

REVISED CODES.

Section.	Chapter.	Page.
	39	170
402		279
411		277–279
411		280
414		61
417		61
442		277–280
491		485–486–494
491		498
493		402
498		90–92
500		91
503		91
504		91–93
510		93
515		399
515		402
524		395
524		399
524		403–404
524		405–485–494
524		497
526		491
528		499
559		497
563		489
566		484–487–489
660		566
663		568
1114		81
1151		81
1269		509
1273		513
1336		394
1337		394
1338		394
1339		394
1790		367
1791		317–368
1792		368
2028		182–185
2034		185
2082	Subd. 11	457
2082	Subd. 21	457
2082	Subd. 21	460
2082	Subd. 27	457
2082	Subd. 28	458
2082		457–460
2082		486
2148	Subd. 77	5
2171		69–70–71
2172		69–71
2172		70–534–536
2173		69–71
2174		69–70–71
2190		1–7
2262		1–7–8–9
2263		9–10
2264		9–10–11–12
2300		512
2333		5
2537		81
2540		547
2541		81
2542	Subd. 8	81
2761		237
2762		237
2764		558
2765		277
2802		381
2806		376–379–382
2947	Subd. 3	21
3124		301–302–303
3131		302
3380		451–454–455
3381		454
3383		451–454–455

STATUTES CITED AND CONSTRUED—Continued.

Section.	Page.
3388	454
3515	482
3625	274–276
3738	264
3744	376–381–382
3840	356
3865	103
3871	478
3888	120–483
3889	482
3900	438
3936	282
3936	285
3958	153–156
4106	389
4107	389
4111	383–389
4131	389–391
4133	383
4133	387
4263	191–195
4265	195–196–524
4273	196–524
4315	101
4379	524
4380	524
4391	524
4393	524
4441	301–303
4445	301
4649	373
4650	373
4676	282–285
4683	189
4699	264–273–369–375
4700	264–273
4714	189
4738	585–586
4830	347–353–359
4836	473
4971	408
5000	208
5000 Subd. 2	430–431
5000	431
5002	53
5053	473
5124	547
5142	32
5156	178–554
5168	97
5176	277–279–280
5179	174
5220	275
5221	454
5223	451–454
5234	499–501
5273	427
5274	112
5274 Subd. 2	113
5276	427–429
5277	429
5278	105
5284	429
5291	333
5306	412
5332	594
5352 Subd. 3	592
5352 Subd. 5	592
5363	50
5363	51
5366	50
5409	413–415
5414	429
5419	55
5420	196–597
5460	196
5467	60–61–83–84–85–317–326–95
5499	87–89
5520	275
5574	97
5578	593
5583	97
5585	593
5605	298
5606	297–298
5606	299
5619	172
5625	300–581
5626	78–166–169–170–179
5626 Subd. 2	593
5627	78
5630	55–72
5630	55-72-73-77-79-83-84-85 86–87–106–107–595 596–597–598–599–630
5651	180
5754	163
5785	302
5904	413–415–509
5934	240
5955	80
5974	24–32
5976	24–32
6013	409–411
6098	60
6120	593
6128	170
6644	229
6650	227–228–280
6651	229
6683	226–227
6802	302
6903	302
6804	302
6815	292–293–294
6995	327
6996	327
7550	198–199

STATUTES CITED AND CONSTRUED—Continued.

Section.	Page.	Section.	Page.
7601	549-553-556	8195	563
7602	553	8295	303
7605	558	8648	169
7614	553-554	8651	167-173-180
7621	111-112-113	8669	168
7740	169	8672	171
7755	277-279-280-281	8685	171
7966	549-556	8688	169
7970	556	Art. 8, Ch. 10, Rev. Codes	242
7978	556	Art. 8, Ch. 10, Rev. Codes	86
7982	555	Art. 1, Ch. 22, Rev. Codes	242
7983	549-555		

COMPILED LAWS.

Section.	Page.	Section.	Page.
689	186	4654	439
1639	510	5215	297-299
1640	117-509-513	5236	169
1643	513	5260	587
2908	163	5416	164
3171	142	5468	257
3190	141	5476	245-246-257-259
3192	141	5499	31-32
4384	586	7025	169
4603	431		

CONSTITUTION.

Section.	Article.	Page.	Section.	Article.	Page.
1	IX	289	87		174
8		554	118		277
11		565-567	121		400
14		80	129		400
15		239	175		286-291
61		65-66-67-392-581-582	176		288
69		567	179		18-19

CRIMINAL PROCEDURE.

Chapter.	Page.
20	166-171-173

CIVIL PROCEDURE.

Article.	Chapter.	Page.
	39	166
	27	302
8	10	579
	14	579
	8	376-380

POLITICAL CODE.

Article.	Chapter.	Page.
6		279
7	28	69
8	12	489
18	18	19

STATUTES CITED AND CONSTRUED—Continued.

SESSION LAWS.

Year.	Chapter.	Section.	Page.
1883	112		81
1887	130	9	49
1887	130		48
1889	41		141
1889	16		163
1889	110		48
1890	71	8	554
1890	126		583
1890		84	583
1890	132	84	581
1890	23		608
1890	132		505
1890	132	92	505-515
1890	132	86	418
1890	132	84	533
1891	118		286
1893	82		598
1893	112		81
1895	25		392
1895	90	10	346
1897	7		231
1897		76	493
1897		79	416
1897		88	513-583
1897	38		545
1897	112		81
1897	118		286-288
1897	126	88	505
1897	126	110	509
1897	126		65
1897	5		77-83-84-85-204 578-579-595-596
1897	5		55-209-252-580-597
1897	126	88	65-66-67-505 630
1897	126		65-66
1897	67		418-456-457
1897	65	10	547
1897	39		559-561
1897	5		77-204-595-596
1897	85		167-172-173-180
1897	126	79	413-415-513
1897	126	88	513-583
1897	126	110	509
1897	38		96-97-98
1899	118		286-288
1899	143	1	565
1899	143		566

STATUTE OF FRAUDS. See LANDLORD AND TENANT, 121; SALES, 153.

STENOGRAPHER'S TRANSCRIPT. See STATEMENT OF THE CASE, 106; RULES OF COURT, 59.

STREETS. See MUNICIPAL CORPORATIONS, 504, 534, 69.

SUBSTANTIAL PERFORMANCE. See CONTRACTS, 158.

SUCCESSION. See BASTARDS, 376.

Where both the personal and real property of an intestate is situate within this state, which was also his domicile at the time of his death, the laws of this state govern the descent and distribution thereof, following the rule that the desent of the personal property is governed by the law of the domicile of the owner, and the real property by the law of the place where situated. Eddie v. Eddie, 376.

The provisions of a will relating to personal property situated in this state, must be construed according to the law of the domicile of the testator atthe time of his death. Crandell v. Barker, 263: Knox v. Barker, 272.

SUPREME COURT. See APPEAL AND ERROR, 96 COSTS, 96.

TAXATION. See CONSTITUTIONAL LAW, 286; QUIETING TITLE, 413.

A tax deed which recites that the tax certificate was issued to an investment company, but that the grantee is the legal holder of such certificate, and that it was assigned to him by E. L. Emery, secretary, which has been of record more than three years, is valid on its face and cuts off all interest under a prior tax deed to the same property, pursuant to Sec. 1640, Comp. Laws, providing that no action shall be commenced by the former owner of lands to recover possession of lands sold for non-payment of taxes unless such action shall be commenced within three years after the recording of such deed. Meldahl v. Dobbin, 115.

Under the revenue law the summary process provided by statute in the enforcement of taxation is an exclusive remedy, and an action in equity in the nature of a suit to foreclose a mortgage does not lie to foreclose a lien on land created by a tax levy. McHenry v. Kidder County, 413.

Where lands had been sold at the annual tax sale in 1895, in satisfaction of taxes levied against them, which became delinquent in 1895 and prior years, and were never redeemed from such sale, all the rights acquired by the statute under such tax sale were voluntarily surrendered by the state by virtue of an act of the legislature, Ch. 126, Laws 1897, entitled "An act to enforce the payment of taxes which became delinquent in and prior to the year 1895, where the statute voluntarily accepted in lieu of its rights acquired in the land bid in by the state, the right to enforce the original tax on which such sales were made." McHenry v. Kidder County, 413.

Under Ch. 67, Laws 1897, a sheriff is not entitled to a fee of five dollars upon each description for selling land for delinquent taxes pursuant to judgment where such lands are bought in by the treasurer for the county. Wilson v. Cass County, 456.

Laws 1890, Ch. 132, requiring real estate to be assessed in the name of the owner, if known, and that real estate separately owned should be separately described, is mandatory. Roberts v. First Nat. Bank, 504.

Laws 1890, Ch. 132, Sec. 92, providing for certain cases where an entire valuation may be divided and portions thereof transferred to different parts of the tract in solido, applies only where, after the tax list has been delivered to the assessor and before the tax becomes a lien, a portion of an entire tract is transferred. Roberts v. First Nat. Bank, 504.

Where, prior to the preparation of the real estate tax list, a portion of a lot was transferred and the conveyance duly placed on record, a subsequent assessment of the entire lot at a lump sum against the original owner was void. Roberts v. First Nat. Bank, 504.

TAXATION.—Continued.

It is competent for an assessor in assessing real estate to describe the same as the title appears of record. He is not required to search for unrecorded instruments or to pass on the validity of those on record where they are not void on their face. Roberts v. First Nat. Bank, 504.

Where an entire lot in a city was assessed in solido for a lump sum, it was not competent for the treasurer to sell any portion of such lot for the tax on such portion. Roberts v. First Nat. Bank, 504.

The legislature may make a tax deed or tax sale certificate conclusive evidence of the due performance and regularity of all tax proceedings that are exclusively within legislative control, but not of such matters that are jurisdictional, such as the sale of a portion of a lot where the entire lot was assessed in solido for a lump sum. Roberts v. First Nat. Bank, 504.

The legislature may make the recitals in a tax deed conclusive as to the description of the land on which the tax was delinquent and as to the land sold, and where the descriptions were unambiguous evidence on these points dehors the deed cannot be considered. Roberts v. First Nat. Bank, 504.

Where there are jurisdictional defects in a tax proceeding, the recording of a tax deed issued pursuant to a sale for such tax will not set the statute of limitation running in favor of the party claiming under such deed, and it is immaterial whether such facts appear on the face of the deed or aliunde. Roberts v. First Nat. Bank, 504.

Where a sale of land for taxes is set aside as void and the purchaser has paid subsequent taxes on the land, he is not entitled to a judgment against the fee owner for the amounts thus paid. His remedy, under Laws 1897, Ch. 126, Sec. 88, being against the county. Roberts v. First Nat. Bank, 504.

Sec. 84, Ch. 132, Laws 1890, does not conflict with Sec. 61 of the state constitution. The provision in said section allowing illegal taxes to be recovered from the county, which have been paid into the county treasury at tax sales made under the provisions of said act, are germane to the subject of the act as expressed in its title, and not repugnant to the constitution. Such provision aids in the collection of taxes in this, that they offer an additional inducement to purchasers to bid at tax sales held under the provisions of the act. Paine v. Dickey County, 581.

Where the illegality of taxes is determined in an action between other parties, the statute does not contemplate that the county is to have notice of the pendency of such action, or be made a party thereto, the judgment in any such action is prima facie valid and is conclusive upon the question of liability of the county, at least until the same is attacked and shown to have been illegally or collusively obtained. Paine v. Dickey County, 581.

A private citizen cannot under the provisions of Sec. 88, Ch. 126, Laws 1897, recover from the county treasurer moneys paid for real estate taxes upon land within the indemnity belt of the Northern Pacific Railway Company, such section of the statute is void under Sec. 61 of the constitution. Divet v. Richland County, 65.

Under the constitution, Sec. 179, relating to taxation of railroads, the word "roadway" includes not only the ground on which the main line is located but that necessary for side tracks, turn-outs, station houses, and all other accommodations reasonably necessary to accomplish the object for which the company was incorporated. C., M. & St. P. Ry. Co. v. Cass County, 18.

TAXATION.—Continued.

A tax deed valid on its face, and which has been on record for more than the full time limited by law in which to bring an action to set aside or void such tax deed, is effective to cut off all interest under a prior tax deed on the same property. Meldahl v. Dobbin, 115.

Where there has been no levy for costly city improvements, a contract for such improvements may be enjoined as illegal. Engstad v. Dinnie, 1.

TAX LEVY. See TAXATION, 1.

TAX SALES. See TAXATION, 456.

TORTS. See PRACTICE, 198; EVIDENCE, 198.

To recover damages under the provisions of Sec. 7550, Rev. Codes, for injury done to horses by reason of their running into a barbed wire fence across a trail which had been in use for one year prior to the act of building, the plaintiff must show that the defendant built or placed an unlawful fence across the trail, and that it was willfully done. Kuhnert v. Angell, 198.

TOWNS.

When township officers perform an act within the power of the township in an improper and unlawful manner, it is the act of the town. Township of Noble v. Aasen, 77.

The word "city" as used in Sec. 1, Ch. 143, Laws 1899, does not include incorporated towns or villages. Plummer v. Borsheim, 565.

TOWNS AND VILLAGES. See CITIES, 565.

TOWNSHIP WARRANTS.

Township warrants are not negotiable within the meaning of the law merchant. Gilman v. Gilby Township, 627.

TRANSFER. See SALES, 474.

TRIAL. See PRACTICE.

TROVER AND CONVERSION. See CONDITIONAL SALES, 243; CONVERSION, 243, 200, 364.

Where, by the terms of a farm contract, the title of the grain was to remain in the landlord until division, the tenant to deliver the same into an elevator at Erie in the name of the landlord, but took the tickets in his own name, the wheat was mixed with other wheat of like grade and kind and subsequently shipped out of the state in the due course of business by the defendant. The elevator company was *held* an innocent bailee of the wheat without notice, the receiving of the wheat, issuing of storage tickets, and the mingling of the grain were innocent acts and do not constitute conversion. Towne v. Elevator Company, 200.

A court cannot judicially notice the value of grain at a given date, even where the evidence shows its value at a date two weeks prior to the date in question. Towne v. Elevator Company, 200.

The owner of grain in an elevator demanded the same before bringing suit for its conversion and the elevator company refused to deliver the wheat on demand. *Held*, that such demand and refusal operated as a conversion of the wheat. Towne v. Elevator Company, 201.

TROVER AND CONVERSION.—Continued.

In an action for the conversion of wheat which had been innocently received by a puble warehouseman in the due course of business, evidence of a demand and refusal to deliver were necessary and proof of value of the grain on the day of the demand. Towne v. Elevator Company, 200.

Where personal property owned by a co-partnership in Manitoba as vendor under conditional sale notes, reserving title in it, is brought into this jurisdiction by the vendee without its authority or knowledge, its title to such property continues until defeated by a voluntary waiver thereof. In an action by the vendor to recover in conversion the value of such property, the defense of waiver of title is for the jury where the evidence is not clear and convincing. Warnken v. Langdon Mer. Co., 243.

Plaintiff delivered to defendants, at a public warehouse, certain grain to be stored until plaintiff desired to sell. Subsequently plaintiff demanded of defendants pay for the grain, or a return to him of a like quality, kind and quantity of grain. Defendants refused to comply with the demand, and this refusal prima facie constituted a conversion of the grain. Marshall v. Andrews & Gage, 364.

Where a public warehouseman was sued for the conversion of grain which it alleged to have been destroyed by fire, the burden of proof was upon the defendants to establish that plaintiff's grain was destroyed as alleged. Marshall v. Andrews & Gage, 364.

Where an action was tried as an action for conversion, the point cannot be first raised on appeal that it was an action of replevin and that the verdict is not such as the law requires in that form of action. Marshall v. Andrews & Gage, 364.

To entitle one to maintain an action for the conversion of personal property, he must show that at the time of the alleged conversion he had possession, or a legal right to the immediate possession, and a general or special ownership in the property converted. Clendening v. Hawk, 419.

In an action by a second mortgagee against a first mortgagee for the conversion by the latter of property covered by both mortgages, where it appeared that the value of the property converted exceeded the amount due upon the first mortgage lien, it was error to direct a verdict for the defendant. Clendening v. Hawk, 419.

The second mortgagee may maintain an action against the first mortgagee for the conversion by the latter of the personal property included in both mortgages. The measure of recovery in such case is the value of the property converted, not exceeding the amount due on plaintiff's lien, less the amount due upon the first mortgage. Clendening v. Hawk, 419.

Subd 2, Sec. 5000, Rev. Codes, permits a recovery in conversion by the injured party of the highest market value of the property converted, at any time between the conversion and the verdict, where he has prosecuted his action with reasonable diligence. An unexplained delay of eleven months in commencing action is not reasonable diligence. First Nat. Bank v. M. & N. Elevator Co., 430.

Under the evidence following Lane v. O'Toole, 8 N. D. 210, *held*, that the plaintiff was not the owner of the wheat in question, and hence could not recover for its conversion. Omlie v. Farmers' State Bank, 570.

TRUSTS.

The holder of a sheriff's certificate of sale of land, who by fraud and false promises prevented the owner from redeeming within the statutory period, and in violation of an oral agreement to extend the period of redemption takes a sheriff's deed of the land, thereby becoming an involuntary trustee under Sec. 4263, Rev. Codes, providing that one who gains a thing by fraud, the violation of a trust, or other wrongful act, is an involuntary trustee for the benefit of the person who otherwise would have had the thing gained. Prondzinski v. Garbutt, 191.

Where a chattel mortgage upon a stock of merchandise provided in terms that the mortgagor should remain in possession and sell the mortgaged property at retail, for cash only, and also required the mortgagor to keep accurate accounts of such sales and turn over all the proceeds thereof to the creditor to be applied by him on the mortgage debt, such mortgage was not fraudulent in law as embodying a secret trust for the benefit of the debtor. In such cases the crucial question is whether the arrangement entered into is honestly made to secure the payment of an actual indebtedness secured by the mortgage, or whether on the contrary it is a mere shift or device to shield the debtor's property from attack by other creditors, while it enables the debtor to proceed with his business for his own advantage. Red River Valley Nat. Bank v. Barnes, 432.

Under Secs. 3380 and 3383, Rev. Codes, inclusive, a deed of trust not requiring or authorizing the trustee to do any act or perform any duty with respect to the real estate or the title thereto, conveys the whole estate, both legal and equitable, to the cestui que trust. Smith v. Security Co., 451.

A trustee of a dry trust having no authority under Secs. 3380 and 3383, Rev. Codes, cannot convey any title to the trust property. Smith v. Security Co., 451.

Where a trustee under a dry trust who has no authority conveys the real estate to others, the latter acquires no interest authorizing him to bring an action in his own name as trustee to remove clouds from the title conveyed. Smith v. Security Co., 451.

Partners are trustees for each other, and as such one partner may not use partnership property for his own profit; and if he does, may be required to account for the profit made, or value of its use. Lay v. Emery, 515.

USURY. See BUILDING AND LOAN ASSOCIATION, 145, 136.

ULTRA VIRES. See CORPORATIONS, 1; TOWNSHIPS, 77.

It is ultra vires the power of a cashier of a state bank to borrow money for the bank without authorization of the board of directors, unless the act is subsequently ratified. First Nat. Bank v. Michigan City Bank, 608.

VENDORS' LIENS. See VENDOR AND PURCHASER, 347.

VENDOR AND PURCHASER. See SALES, 243; BANKS AND BANKING, 499; TRUSTS, 115, 451, 444; TAXATION, 504; TROVER AND CONVERSION, 570.

Where personal property owned by a partnership in Manitoba as vendor under conditional sale notes, reserving title in it, is brought into this jurisdiction by the vendee without its authority or knowledge, its title to such property continues until defeated by a voluntary waiver thereof. Warnken v. Langdon Mer. Co., 243.

VENDOR AND PURCHASER.—Continued.

In a contract of sale of real property it was provided that payment should be made by delivering to the vendor in an elevator the one-half of all grain raised on the premises each year, and that until such delivery the title to the entire crop should remain in the vendor. *Held*, that while the contract remained in force the vendee was entitled to the possession of the crop for the purpose of threshing and preparing it for delivery as specified in the contract. Boyum v. Johnson, 306.

Where, in a contract for sale of real property, it was provided that default in the performance of any of the covenants therein contained, which at the election of the vendor rendered the contract void, and there was a default in the covenant to pay taxes, and after such default the vendee with the knowledge of the vendor proceeded to expend labor and money in planting and producing a crop upon said land, *held*, that after such crop was produced it was too late for the vendor for the first time to give notice of his election to declare the contract void by reason of such default and thereby secure the entire crop. Under such circumstances the law conclusively presumes that the default was waived. Boyum v. Johnson, 306.

An agreement by the vendee to pay a note of the vendor held by a specified bank as part of the purchase price, does not constitute payment as between the vendor and vendee if the promise be not performed. The debt for purchase price still exists to that extent and the vendor may have a vendor's lien upon the realty established for such unpaid portion without regard to his note to the bank, provided his obligation be still outstanding. Bray v. Booker, 347.

When, upon the sale of real property, the vendor accepts the vendee's note for a portion of the purchase price, and the vendee for the sole purpose of enabling the vendor to discount said note at the bank, gives the vendor collateral security for the payment of the note, such security is nevertheless given to and for the benefit of the vendor, and under Sec. 4830, Rev. Codes, gives a vendor's lien for so much of the purchase price as remains unsecured, no vendor's lien upon the realty can be established for the amount represented by such note. Bray v. Booker, 347.

A waiver of a vendor's lien cannot be presumed from the simple fact that the vendor executed the deed after the vendee had refused to mortgage the property to secure the purchase price, and had stated that he desired to receive the property free from all incumbrances. Bray v. Booker, 347.

The purchaser of land in actual possession of one other than the vendor has constructive notice of the rights of the person in possession. O'Toole v. Omlie, 444.

A bona fide purchaser for value of personal property obtains a good title notwithstanding the fact that his vendor's title may have been obtained by fraud. Tetrault v. O'Connor, 15.

A debtor is chargeable with notice of transfer by his creditor of a negotiable instrument on which he is maker, and thereafter cannot safely pay the original creditor, although he is ignorant of such transfer. Hollinshead v. Stuart, 35.

An unrecorded deed, the creditor holding the full legal title, is sufficient to pass the full title to the grantee as between the parties, subject to be defeated only by a subsequent conveyance by the grantor in such unrecorded deed to one who takes in ignorance of the fact that such deed had been given, and where the grantee in such unre-

VENDOR AND PURCHASER.—Continued.

corded deed conveys to a third party with full covenants and such deed is recorded, and subsequently the grantor in the unrecorded deed conveys the same property by quit-claim to such third party, which deed is also recorded, such party holds the full, legal and record title to the property. Meldahl v. Dobbin, 115.

The Cass County Bank, under direction of Oliver C. Dalrymple conveyed by special warranty deed to John C. Dalrymple certain estate in trust for the use and benefit of the children of said Oliver C. Dalrymple, which children were also the children and minor heirs of a deceased wife of Oliver C. Dalrymple. By its terms said special warranty deed did not require or authorize said John C. Dalrymple as such trustees or otherwise to do any act or perform any duty or exercise any power with respect to said real estate, or with respect to the title thereto. Accordingly, *held*, that said deed did not vest any title or estate whatever in said John C. Dalrymple, in trust or otherwise, and that said deed operated under the statute to convey the whole estate, both legal and equitable, to said minor heirs. Smith v. Security Co., 451.

On December 5th, 1885, plaintiffs executed and delivered to defendant O. M. Omlie a deed of warranty of certain real esate owned by Thomas O'Toole. Later, and in February, 1887, plaintiffs executed and delivered to said defendant a quit-claim deed of the same land, which recited that the same was executed to perfect and make absolute the warranty deed. Both deeds were absolute on their face, and both were duly recorded. But under the evidence both deeds were given as security and as between the parties thereto were mortgages, and not absolute conveyances. While the plaintiffs were residing upon the land Omlie conveyed the land to the defendant Lane, by deed of warranty, which was duly recorded. Under the circumstances of the case it was *held* that Lane purchased with constructive notice of plaintiff's rights. O'Toole v. Omlie, 444.

VERDICT. See NEW TRIALS, 153; INSTRUCTIONS, 153; APPEAL AND ERROR, 153, 191.

A verdict in an equity case is merely advisory, and the action of the trial court in setting the same aside will not be reviewed by the appellate court. Prondzinski v. Garbutt, 191.

A verdict will be set aside and a new trial ordered where the evidence is insufficient to sustain the verdict rendered. Dinnie v. Johnson, 153.

Where an action was tried in the lower court as an action in conversion, the point cannot be raised for the first time in the Supreme Court that the action was in fact replevin, and that the verdict is not such as the law requires in that form of action. Marshall v. Andrews & Gage, 364.

To sustain a verdict it must appear that it might have been reached by a jury in the exercise of an unbiased and unprejudiced judgment. The scintilla rule is repudiated in this state. Rosenbaum v. Hayes, 469.

Under the facts of the case, *held*, that it was error for the court to deny defendant's motion for a directed verdict. Omlie v. Farmers' State Bank, 570.

A verdict based upon conflicting evidence will not be disturbed. Muri v. White, 58.

The Supreme Court will not examine the evidence in cases tried to a jury further than to determine whether it is sufficient to sustain the verdict. Howland v. Ink, 63.

VERIFICATION. See CRIMINAL LAW, 548.

The verification by a state's attorney of a complaint for violation of the prohibition law made upon information and belief is insufficient unless there is filed therewith the affidavit of some witness on which such information is based. State v. Rozum, 548.

VOTERS AND ELECTIONS. See ELECTIONS, 484, 395, 404.

WAIVER. See APPEARANCE, 226; SALES, 243; VENDOR AND PURCHASER, 306; FACTORS AND BROKERS, 461; NEW TRIAL, 315.

A general appearance is a submission to the jurisdiction of the court and waives defects of jurisdiction. Benoit v. Revoir, 226.

The right to move for a new trial because of misconduct of the jury may be waived by laches. Kinneberg v Kinneberg, 311.

The fact that the statement of case was not filed with the clerk of court before motion for new trial was argued, is waived unless objection is made at the time the motion for new trial was heard. Plano Mfg. Co. v. Jones, 315.

Where the vendor of real property accepted the vendee's note for a portion of the purchase price and the vendee, for the sole purpose of enabling the vendor to discount said note at the bank, gives the vendor collateral security for the payment of the note, such security is given for the benefit of the vendor, and under Sec. 4830, Rev. Codes, no vendor's lien upon the realty can be established for the amount represented by such note. Bray v. Booker, 347.

A vendor may waive his right to a vendor's lien by any language or conduct clearly manifesting an intention to waive the same, but such waiver cannot be presumed from the simple fact that the vendor executed the deed after the vendee had refused to mortgage the property to secure the purchase price and had stated that he desired to receive the property free from all incumbrances. Bray v. Booker, 347.

Where an action was tried in the lower court as an action for conversion, the point cannot be raised for the first time in the Supreme Court that the action was in fact replevin, and that the verdict is not such as the law requires in that form of action. Marshall v. Andrews & Gage, 364.

The law will not allow a party to insist upon and enforce in his own behalf a secret lien upon personal property after he has claimed it unconditionally as his own, and has thereby induced another to act in relation to it, in some manner affecting his own interest, as he would or might not have done if he had been openly and fairly notified of the additional ground of claim. It would be fraudulent in him to practice such concealment to the injury of another, and to prevent the possibility of attempts so unjust becoming successful the law implies that an intended concealment of that kind is of itself a waiver of the lien. Rosenbaum v. Hayes, 461.

By replying to a counterclaim plaintiff waived the point that the facts stated did not constitute a counterclaim that could be pleaded in the action, and could only insist that they did not constitute a cause of action in favor of the defendant that could be enforced against plaintiff under any circumstances. Township of Noble v. Aasen, 77.

Plaintiff sued in the short form of complaint to quiet title. The answer alleged ownership in defendant and asked for affirmative relief ousting the plaintiff from possession and quieting title in defendant. To this counterclaim no reply was made. No motion for judgment was made but defendant objected upon the trial to all evidence offered

WAIVER.—Continued.

by plaintiff in support of an estoppel upon which the plaintiff depended for success. No estoppel was pleaded, *held*, that it was waived. Morris v. Ewing, 105.

WAREHOUSEMEN. See CLAIM AND DELIVERY, 44; ELEVATOR COMPANIES, 44.

One receiving in payment of a claim general storage tickets for wheat delivered to an elevator, *held* to have no control over the identical wheat, but could only claim delivery of the number of bushels named in the tickets and of the grade therein specified. Best. v. Muir, 44.

Plaintiff sold land to be paid for in crop raised by the purchaser, stipulating that one-half of the crops each year were to be delivered to some elevator in a specified town and elevator ticket taken in plaintiff's name. The contract was not filed for record. Defendant received all the purchaser's 1895 crop and issued tickets to him without knowledge of the contract and mingled the wheat with other grain in its elevator. Under these circumstances the defendant was an innocent bailee, so that there was no conversion until a demand by plaintiff for the surrender of the wheat. Towne v. Elevator Company, 200.

Plaintiff delivered to defendants at a public warehouse owned and operated by them in this state certain grain to be stored until plaintiff desired to sell. Subsequently plaintiff demanded of defendants pay for the grain or a return to him of a like quality, kind and quantity of grain. *Held*, that a refusal to comply with his demand constituted prima facie a conversion of the grain by defendants. Marshall v. Andrews & Gage, 364.

In an action for conversion against a warehouseman for grain stored, the defendants allege that their warehouse was destroyed by fire, with its contents, and that plaintiff's grain was contained therein. Plaintiff by reply admitted the burning of the warehouse but denied that plaintiff's grain was contained therein. Under these pleadings the burden of proof was upon defendants to establish that the plaintiff's grain was destroyed as alleged. Marshall v. Andrews & Gage, 364.

WILLS.

A will relating to personalty in this state, must be construed according to the law of the domicile of the testator at the time of his death. Crandell v. Barker, 263; Knox v. Barker, 272.

A Pennsylvania will bequeathed the use and interest of a mortgage on land in North Dakota to testator's daughter for life, and then to her children, if she would leave any, but if she should die without issue then to be equally divided between two other daughters of the testator. Under the Pennsylvania law the first named daughter, who survived the testator, takes only a life estate, and on her death without issue the mortgage becomes the property of the two other daughters. Crandell v. Barker, 263.

A citizen of Pennsylvania by his will, which was duly probated in that state, declared (item six) another mortgage which I hold against John R. Barker and Maria J. Barker, of $1,345, dated March 1st, 1887, covering certain lands in Grand Forks county, I give, devise and bequeath the use and interest thereof to my daughters Orcelia Crandell and Barbara Knox, for and during the terms of their natural lives, and at their deaths I give and bequeath the said mortgage to the heirs of my said daughters Orcelia Crandell and Barbara Knox, share and share alike. *Held*, that under the law of Pennsylvania,

WILLS—Continued.

Orcelia Crandell and Barbara Knox, after the death of the testator, became the absolute owners of said mortgage. Knox v. Barker, 272.

WITNESSES.

A writing signed by a witness before the trial was in direct conflict with his statements on the stand as to material matters. *Held*, that said writing was admissible to impeach the witness. Baumer v. French, 319.

In an action for malicious prosecution plaintiff called the sheriff who made the arrest as a witness and he testified merely that he arrested plaintiff under the warrant and held him in custody for a certain length of time. The warrant of arrest directed the sheriff to seize the property as well as the person of the plaintiff. *Held*, that it was error over objection to permit a cross-examination as to what property the sheriff seized, where he found it, what condition it was in, and what plaintiff said as to where it was and how it came to be there, the object being to show that plaintiff was trying to conceal his property, and that defendant therefore had probable cause for causing his arrest. Keappler v. Red River Valley Nat. Bank, 406.

A defendant in a criminal case is a competent witness in his own behalf, but on cross-examination is subject to the same rules that would govern other witnesses, and may, as affecting his credibility, be asked as to collateral crimes, even when his answers may disgrace him in the eyes of the jury. State v. Rosum, 548.

Threats made for the purpose of destroying or withholding evidence may be proven against a defendant, and he may be inquired of concerning such threats upon cross-examination. State v. Rosum, 548.

When a question is so framed that an answer cannot aid the jury, it is properly excluded, though otherwise competent. Tetrault v. O'Connor, 15.

A mortgagee is disqualified from being one of the two witnesses to a chattel mortgage, required by Sec. 4738, Rev. Codes, by reason of being an immediate party to the instrument. Donovan v. St. Anthony & Dakota Elev. Co., 585.